No. 7773

# In the United States Circuit Court of Appeals for the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

*v.*

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

*Upon Appeal from the United States District Court for the District of Idaho, Northern Division*

## BRIEF OF APPELLEE

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## BRIEF OF APPELLEE

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## STATEMENT OF CASE.

This is an appeal from an order granting an injunction *pendente lite,* restraining the defendants from proceeding with the construction of a municipal electric generating plant and distribution system and the financing thereof with Federal Emergency Administration of Public Works funds (Trans. R., p. 190).

## ALLEGATIONS OF THE COMPLAINT.

*Description of Plaintiff's Property*

The appellee, a Washington corporation, authorized to do business in Idaho, is the owner of a hydro-electric power plant situated in the Spokane River at Post Falls, Idaho, about ten miles distant from Coeur d'Alene, and the owner of several hydro-electric plants situated on the same river in the State of Washington. The power plants are connected by transmission lines for the purpose of affording continuity of service to its customers in Northern Idaho and Eastern Washington. It furnishes electric power for practically all consumers in the northern counties of Idaho, and has ample power capacity and facilities to serve all uses now existing or reasonably to be anticipated for many years. Its plants, transmission lines and facilities were designed and constructed to render electrical service to the above territory, and it has been authorized either by gen-

eral laws or by authority of the Public Utilities Commission of the State of Idaho to construct, own, operate and maintain the same. Its properties and facilities are modern and efficient and it renders a completely adequate and efficient electric utility service. It owns distribution systems in various cities and villages of Northern Idaho and serves the inhabitants thereof and the territory adjacent thereto (Par. V.; R., pp. 10 to 13).

Appellee holds a franchise, granted to its predecessors, to furnish the City of Coeur d'Alene with electricity for lighting and other purposes for a period of fifty years from October 19, 1903, under which it and its predecessor have rendered such services for more than thirty years.

In 1930, appellee purchased the electric power and light system of the City of Coeur d'Alene and has since owned, maintained and operated it. Since acquiring the same, it has expended more than $33,000 in improving and reconstructing the system and $27,000 in the installation of new transformers, providing continuity of service through two independent connections.

The rates charged for electric services are subject to regulation and control by the Public Utilities Commission of the State.

In 1922, the rates for electric service in Coeur d'Alene were fixed by the Public Utilities Commis-

sion after a valuation and rate hearing. The rates remained the same until the appellee, with the approval of the Public Utilities Commission put into effect reductions in four different rate schedules aggregating $11,400 annually.

Coeur d'Alene had a population in 1930 of 8,297. Appellee furnishes electric services to all classes of customers who number 2,377, and, in addition, to approximately 332 additional customers residing in territory adjacent to the city, and supplies all electric light and power sold and distributed in the city. Its investment in the distribution system, exclusive of generating and transmission equipment, is more than $200,000.

It is a taxpayer of the United States, of the State of Idaho, of the County of Kootenai, of the City of Coeur d'Alene, and of other taxing districts.

Taxes in Idaho paid by the appellee for the year 1933 upon its generating, transmission and distribution systems amounted to more than $214,000, of which there was paid to the County of Kootenai for state, county and municipal taxes within the county the sum of $66,547.94, and in addition thereto, appellee paid to irrigation districts adjacent and tributary to Coeur d'Alene the sum of $10,855.74 in lieu of taxes it would otherwise be required to pay to the state and its subdivisions—a total of $77,403.68. (The sum paid to the irrigation districts represents taxes upon property of appellee used for gen-

erating and delivering electric power to the extent such property is used for furnishing power for pumping water for irrigation or drainage purposes in Kootenai County. The exemption accrues under the laws of Idaho to the benefit of consumers of power for such purposes and is fixed by the State Board of Equalization.)

The total gross revenue received from customers in Kootenai County for the year 1933, including the City of Coeur d'Alene, amounted to the sum of $148,333.16 more than one-half of its total gross revenue in the county being paid in said taxes. In addition thereto, appellee paid to the State of Idaho on account of power generation in said county a considerable sum of money under what is known as the Kilowatt Hour Tax.

All of appellee's property in Coeur d'Alene is subject to state, county, city, school and other municipal taxes. (Par. VI.; R., pp. 13 to 16.)

*Acts of Defendants to Construct Competing System*

The city council of the City of Coeur d'Alene in November, 1933, enacted two ordinances, one (No. 713, Ex. A, R., p. 77) calling an election for the purpose of submitting to the voters of the city a proposition for incurring an indebtedness of $300,000 by the issuance of general obligation bonds to pay the costs and expenses of the acquisition by purchase or by construction of a light and power plant and distribution system for the city. At the

same time an ordinance was passed providing for the incurring of a similar indebtedness of $300,000 for the acquisition by purchase or construction of a water system. December 12, 1933, at an election provided for in said ordinances, both propositions were approved by more than two-thirds of the voters. (Reference is made to the ordinance for the acquisition of the water system for the reason that one application was made to the Federal Emergency Administration of Public Works for funds for the two systems (Par. VIII.)

Pursuant to action by the city council on December 14, 1933, the city filed with the Federal Emergency Administration of Public Works an application for funds amounting to the sum of $650,000, and a net loan of $475,000, which in the application is alleged to exclude a 30% grant or gift for the cost of labor and materials to be used in the construction of said two systems.

In the application it appeared that an engineer employed by the city council had made a report and prepared plans for the construction of the said two systems. It appeared that the total cost of the power plant and electric distribution system was estimated at $337,580, which is in excess of the amount of indebtedness authorized to be incurred for that purpose.

Of the sum of $337,580, the total cost of labor and materials was estimated at $276,512.91, contractors' profit $27,578.09 and other costs and expenses $33,480. The amount estimated by said engineer to be expended directly for labor in Coeur d'Alene in the construction of the generating plant and the distribution system amounted only to the total sum of $29,672.75, plus labor on the building to house both the Diesel power plant and the pumping plant for the water system, estimated at $6,900.00. (P. 19.)

Both the report of the engineer and the application to the Public Works Administration set forth that the cost of the complete electric power and light system would be in excess of the sum authorized to be expended by Ordinance No. 713. (Par. IX.; R., p. 19.)

Appellee filed a protest with the State Advisory Board of the Federal Emergency Administration of Public Works against the approval of the application and the granting of said funds (Par. X.; R., p. 19).

The Administrator of Public Works at Washington approved the application of the defendant and proposes to advance funds to the city in the amount of $337,580 for the construction of the electric system, including the so-called grant of 30% above referred to.

Appellee charges that the defendant city and its officers propose to enter into a contract with the Federal Emergency Administration of Public Works by the terms of which it will undertake and agree to construct said Diesel engine electric power plant and power distribution system, costing at least $337,580.

*Allegations Respecting Idaho Constitution*

Paragraph XI of the bill charges that the action of the defendants constitutes the incurring of an indebtedness and creation of a liability exceeding the annual income and revenue of the city without the assent of two-thirds of the qualified voters voting at an election held for the purpose and without provision being made for an annual tax sufficient to pay the interest and provide a sinking fund for the payment of the principal thereof as provided in Section 3 of Article VIII of the Idaho Constitution.

The bill charges that the voters in the city were deceived by certain concealments of facts and by false and erroneous statements prepared under the direction of and given publicity by the city and its officers. The particulars wherein they were deceived are set forth in full in paragraph XIII of the complaint.

The principal and most glaring of these is the charge that the city led the voters to believe that the distribution system would provide service throughout the city and that the report of the engi-

neer as published and given publicity apparently so stated. Whereas, in fact, two sections of the city were omitted from the distribution system; that the concealment of the intention not to supply the said two sections of the city was made for the purpose of deceiving the citizens residing therein and inducing them to vote for said bonds, and that the voters in said sections were deceived into so voting.

It is further charged that the engineer employed by the city prior to the alleged bond elections made a report which was published and which influenced the voters and which was untrue with respect to other material matters. That the report and the advertisements and publicity put out by the city and its officers represented that the rates would not be higher, whereas, the report of the engineer actually shows that even if the city secured 80% of the business "which is assumed by the engineer", it would require an average rate of at least 3.43c per kilowatt hour, exclusive of the power used for pumping water, whereas, appellee now furnishes said service at an average of only 3.33c per kilowatt hour in Coeur d'Alene, exclusive of power used for pumping water.

*Allegations of Injury to Plaintiff*

The injury which appellee will suffer is set forth in paragraph XVI. If the municipal power plant is constructed, appellee will either be compelled to enter into competition and suffer substantial loss in

its operations in the city, or abandon entirely its properties and system in the city. If the system should be abandoned, employees now working would necessarily be discharged and a number of other employees engaged in the maintenance of transmission lines and other services would be reduced.

The business of appellee consists in serving various and divers users in large towns, smaller villages and communities, in rural districts, electric service to farms, pumping water for irrigation and industrial services. Each class of business lends substantial aid to appellee's ability to carry on the others and each class is incapable of withdrawal without substantial impairment of its ability to serve the others.

The bill particularly calls attention to the fact that appellee is now serving a large number of users of electric light and power at their homes and places of business on small tracts adjacent to the City of Coeur d'Alene; that it will be compelled to continue such service to these users as a public service corporation, and yet it can only do so at great loss and inconvenience and probably a substantial increase in rates to said users, whereas the defendant city has no authority to engage in the sale of electricity outside the limits of the city, except that the municipality has the right to sell surplus power, but appellee is advised that it has no power to engage in generating surplus electricity in the city for distribution and sale outside.

That the injury to appellee, its stockholders, bondholders and employees is irreparable. (Pars. XVI and XVII; R., pp. 30-31.)

*Cost of Plant in Excess of Amount Authorized*

The complaint charges that the application of the defendant to the Federal Emergency Administration of Public Works is based upon an engineering report, plans and specifications prepared by an engineer; that a distribution system of the type proposed in said report to supply 80% of the customers of said city, together with a Diesel plant of three units, would exceed in cost the sum of $400,000, and an adequate Diesel generating plant and distribution system for the entire city would cost more than $450,000. These facts are fully set out in paragraph XVIII.

In paragraph XX, the bill charges that it is the purpose of the defendants to construct a plant primarily calculated to serve the business section and the more populous sections of the city and that with the funds provided it will be unable to extend service throughout the city, leaving to appellee the sparsely populated sections wherein the business is unprofitable and where the appellee, if it continued to do business in the city, would be unable to serve at reasonable rates without loss; that the city does not pretend that it will undertake to serve the various irrigation and farming areas in the vicinity of Coeur d'Alene and the loss of business to appel-

lee would seriously impair its ability to continue to serve said users.

*Employment*

Paragraph XXI shows that under the proposed ordinance, the total amount to be paid out for labor in the construction of the electric power and distribution system amounts to a sum but slightly in excess of $29,000, exclusive of labor estimated for the power house and pumping plant at $6,900. (p. 19.)

The bill charges that in the engineering report it is estimated that the labor cost of operation will include five men and one clerk, and for the water system three men should be allowed and for clerical help and supplies $2,000 for both systems.

Actually at the present time, appellee has employed in the electric light and water service 24 employees. Therefore, instead of giving added employment, the plan of the defendants is to reduce employment. The labor required under the city's proposal in the construction of this plant is inconsequential.

*Tenth Amendment*

On September 27, 1934, a release of the Federal Emergency Administration of Public Works set forth in paragraph XXII, declared the purposes, policy and practices adopted with respect to appli-

cations of municipalities for loans and grants to finance municipal systems. In the release it is stated:

> "Municipal or local publicly-owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes. * * *
>
> "However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation." (R., pp. 38-40.)

The release further showed that it was the purpose of the Administrator to control electric rates and to make the loans for that purpose primarily.

The bill charges that the loan and grant for which application had been made by the city could not have been approved "with a view to increasing employment quickly" for the release stated that the purpose of the Administrator was to make elec-

tricity more broadly available at cheaper rates. The undisputed and admitted facts in this case show that Mr. Ickes was applying this policy and practice to the application of the City of Coeur d'Alene, and that his action was guided purely and solely with respect to rates and not with any view to increasing employment quickly or at all. One of the policies announced in the release was that the Public Administrator would make it a practice before approving any municipal loan to give the utility company an opportunity to put into effect rates at least as low as those at which the municipal system would be self-liquidating, had not been given effect with respect to the City of Coeur d'Alene because the city did not contemplate at the time of its application rates lower than those charged by appellee (R., pp. 41-42).

The bill further charged that the city could not construct a Diesel engine electric generating plant and distribution system for the city as proposed in its application and reduce rates below the rates now charged by the appellee and make the same self-liquidating. *For the purpose of this hearing, this allegation is admitted.*

On November 7, 1934, Mr. Post, President of appellee, sent a telegram to the Public Works Administrator which is set forth in the bill. He called attention to the fact that it had been publicly stated that the Public Administrator had approved the

application of the City of Coeur d'Alene. The telegram further stated:

> "Feel sure this application has not been called to your attention because its approval would violate statement of principles contained in Public Works Administration press release number nine eighty-nine dated September twenty-seventh nineteen thirty-four stop Our present rates in Coeur d'Alene are among the lowest in the United States and regulated by Idaho Public Utilities Commission stop Application of the City of Coeur d'Alene for loan and grant which we had an opportunity to answer does not contain any schedule of rates which city proposes to put in force if PWA shall loan and give it money with which to build a system to operate in competition with our company therein stop We have never seen any schedule of rates proposed by the city and it is impossible for the city to make this proposed project self-liquidating under schedules of rates lower than ours stop Construction of Diesel engine plant in Coeur d'Alene at this time would seem to violate all the principles contained in your press release and in other releases of the PWA not only because of the situation outlined above but also because there is at the present time in this territory a large surplus of hydro-generated electrical energy which will be greatly augmented by the Government through the Grande Coulee development stop Feel sure you have no intention to depart from previously announced policies and that Coeur d'Alene application will not be granted." (R., pp. 43-44.)

Mr. Ickes replied by a telegram (R., pp. 44-45) to the effect that the city's proposed electric rates

contemplated a 20% reduction; that if the Washington Water Power Company placed in effect rate reductions equal or greater than that of the city, the Power Board of Review would consider the matter further.

In reply, Mr. Post sent a telegram to Mr. Ickes which is set forth in the bill at pages 45-53 of the record. In substance it stated that it had not been asserted prior to the application that the city intended to reduce the rates; that at a meeting of city officials of Coeur d'Alene with the Public Utilities Commission of Idaho and representatives of appellee, the city officials had stated to the Commission that they were not interested in any reduction in electric rates, but only in municipal ownership. Further that the original papers asking for the loan or grant contained no offer or proposal of a rate reduction and that no paper had been filed or furnished the appellee by the city proposing any such reduction and that if any such had been filed, the appellee should be furnished with a copy thereof. The telegram further called attention to the fact that over 18% of the gross receipts from electric service in the State of Idaho was paid back in taxes; that the proposed municipal plant did not cover the city, but deliberately omitted a portion thereof within the city limits, and also a portion outside the city limits where the Washington Water Power Company had over 300 customers; that the proposed plant could not be built with the amount of money

asked for and to extend it to cover the entire territory would materially increase the shortage.

Attention was called to the fact that the rates of appellee are among the lowest in the United States; that a valuation and rate hearing is in preparation by the Commissions of Washington and Idaho in which it is expected the two Commissions will act together and determine, not only the property valuation, but the reasonableness of all rate schedules in each state; that the appellee's rates are controlled by said Commissions.

In reply thereto, Mr. Post received a telegram from Mr. H. T. Hunt, Chairman of the Electric Power Board Review for the Administrator, stating that Mr. Ickes would consider the points and advise the city officials of his conclusions.

On November 20, 1934, appellee commenced this action. On the same day the City of Coeur d'Alene received from the Federal Emergency Administration of Public Works a proposed contract for execution by the city.

Thereafter and on November 23rd an ordinance was passed and adopted by the city council and approved by the mayor and on the same day published approving the loan and grant agreement between the City of Coeur d'Alene and the United States and authorizing its execution and delivery,

further authorizing the mayor and city clerk to consent to modifications or changes therein and to execute further agreements found desirable.

The agreement referred to provided for a loan and grant not exceeding $650,000 for the financing of a water system and Diesel generating plant and electric distribution system. A copy of the ordinance is attached to the complaint as Exhibit C (R., pp. 87-90) and a copy of the agreement is attached as Exhibit D (R., pp. 91-119). (In passing, it may be noted that this ordinance was passed and the contract signed after notice had been served upon the city of a motion and order to show cause as to why an injunction should not be issued, and before the hearing.)

On November 21st, and prior to the passage of said ordinance and the execution of said agreement, the mayor of Coeur d'Alene received a telegram from the Public Works Administration stating that a rate ordinance would be required as a condition of the loan which would fix rates approximately 20% below existing rates and that an air-mail letter would follow. The air-mail letter was received November 24th and is set forth in the bill of complaint (R., pp. 55-56). It states that a rate ordinance should be passed, stating that the rates referred to in the telegram would be made available by the municipal plant and will not be increased unless and until it is proved to the satisfaction of the Adminis-

trator that the rates are insufficient to provide for operating expenses etc., and further that the ordinance should recite that the agreement of the city to maintain such rates and charges as aforesaid is in further consideration of the grant from the Government and is for the benefit of the electric consumers and taxpayers of the city.

A rate ordinance has not been passed, the defendants being enjoined by the court from further proceeding, but the contract expressly provided:

> "23. *Conditions Precedent to the Government's Obligations.* The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:
>
> * * * * * * * *
>
> (i) Unless and until the Borrower shall adopt a rate and bond ordinance, satisfactory to the Administrator, in form, sufficiency and substance." (R., p. 104.)

The bill alleges that the statements contained in the telegrams sent by Mr. Post were accurate and true. That the approval of the application of the City of Coeur d'Alene and the making of said loan or grant and gift is not made for the purpose of relieving unemployment and the relief of unemployment will not be accomplished to any extent or at all thereby, but that the sole and only purpose or purposes thereof are unlawful and in violation of the National Industrial Recovery Act and in violation of the Tenth Amendment, of the Fifth Amend-

ment, and of the first section of the Fourteenth Amendment to the Constitution of the United States, such purpose or purposes being:

(1) The destruction of the property of the plaintiff because of its failure or refusal to accede to the demand of the Federal Emergency Administration of Public Works to usurp the exclusive power and function of the State of Idaho to fix and regulate rates, charges and service of the plaintiff as a public service corporation engaged in intrastate business in that state and to substitute coercion by an agency of the Federal Government as to such rates, charges and services in place of the lawful and orderly regulation thereof by the state regulatory body which has full, complete and ample authority in relation thereto.

(2) To foster and encourage public ownership and political operation of electric light and power systems whether they may or may not be engaged in interstate commerce.

(3) To usurp and/or override the police powers of the State of Idaho in the following additional respect, to-wit, the State of Idaho has exclusive power to provide the method of regulation of rates charged by municipally-owned public utilities and the attempt of the Public Works Administrator in said contract to fix or regulate the rates to be charged by the City of Coeur d'Alene, or to control the modification thereof in the future is violative of the Tenth Amendment to the Federal Constitution.

## ERRONEOUS STATEMENT OF FACTS IN BRIEF OF APPELLANT ICKES

In the brief of counsel for appellant Ickes, the loan and grant agreement is referred to at pages 10 to 14. On page 11 it is said that the loan and grant agreement expresses the entire intention of the Administrator and the city with respect to the purchase of the bonds. It is said on page 13 that no other action than that expressed in the agreement is contemplated by the Administrator, although reference is made to his letter of November 21st, 1934, to the mayor of Coeur d'Alene, setting forth provisions which he required in the rate ordinance.

Counsel then makes (perhaps because the matter was prepared by some subordinate) a totally untrue statement. It is said that the date of the loan and grant agreement is not shown, but that the certificate attached thereto is dated December 17, 1934. (There is no certificate attached thereto.) It is said that it was executed by the city later. That is not true. If it had been so executed later, it would have been after the decision of the court granting the injunction order and in violation of definite understanding at the time of the hearing upon the order to show cause that no act would be done by any of the defendants toward consummating the enterprise or executing any documents pending the action of the court on the application for an injunction. The fact is that the contract was executed by the city on the 23rd of November, 1934, after the service and

prior to the hearing upon the order to show cause. The defendant city officials gathered together on November 23rd and hastily passed the ordinance approving the loan and grant agreement (Ex. C., R., p. 90), and then executed the contract (Ex. D) prior to the hearing before Judge Cavanah on the 24th day of November.

Said brief further states that the condition as to the rate ordinance set out in the letter of November 21st is not contained in the contract, and "it appears, therefore, that the Administrator has waived the requirements expressed in that letter."

The contract referred to expressly provides that the city shall pass a rate and bond ordinance satisfactory to the Administrator (R., p. 104) and in the letter of the Administrator referred to (R., pp. 55-56) it is said "It will be necessary that the ordinance be approved by the Administrator. This can be done either before or after its adoption." This rate ordinance is not the one which was adopted authorizing the execution of the loan and grant agreement, but is the ordinance referred to in the loan and grant agreement, which was to be thereafter passed, containing rate and other provisions satisfactory to the Administrator. No doubt the counsel who appears for the government, when this is called to his attention, will correct the unquestioned inaccuracies contained in the brief. The enactment of a subsequent rate ordinance, of course, is enjoined.

## QUESTIONS PRESENTED BY THE BILL

### I. *Non-Federal Questions*

The amended bill charges that the actions and proceedings taken in pursuance of the city's plan and the threatened actions which the defendants were about to take under said plan were invalid and unlawful for the following reasons:

(1) Because it is provided by Section 3, Article VIII of the Constitution of Idaho:

> "No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: PROVIDED, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

That the plan and scheme of the defendants provide for the creation of an indebtedness or liability in excess of $300,000 within the meaning and restriction of said provision of the Idaho Constitution.

(2) Because of the concealment from the voters that two substantial sections of the city would not be included within the area to be served by the proposed municipal light and power system constituted such a fraud against the voters and such a concealment as to vitiate the bond election and render the bonds illegal and void.

(3) Because the misleading and false statements, advertisements and information put out by the city and its officials deceived the voters and vitiated the election authorizing the issuance of bonds.

(4) That Ordinance No. 723 Exhibit "C" attached to the bill of complaint and the proposed loan and grant agreement Exhibit "D" provide for one project, to-wit: a project for financing the construction of a water system, including sinking wells, together with the electric light system under which the defendant city and its officials propose to borrow or receive from the United States in the aggregate $650,000.00 and that ordinance and agreement are violative of the Ordinance No. 713 Exhibit "A" calling for an election for the purpose of submitting the proposal of incurring an indebtedness of $300,000.00 for the purchase or construction of a light and power plant and distribution system.

II. *Federal Questions Involved*

(1) **GENERAL WELFARE CLAUSE.** Under the Constitution of the United States, Congress has no

power to make a loan or gift or grant of public moneys of the United States, to the City of Coeur d'Alene to enable the city to construct and operate a municipal electric plant for the generation and distribution of electricity, the purpose thereof not being one for which Federal taxes may be levied and the receipts appropriated or expended in the exercise of the general taxing power of the United States as defined in Article I, Section 8 of the Constitution for the following reasons:

(a) Article I, Section 8, Clause 1 of the Constitution does not authorize Congress to levy taxes or appropriate moneys for objects not within the enumerated powers, expressly delegated to the Federal Government.

(b) That even if Article I, Section 8, Clause 1 of the Constitution authorizes Congress to levy taxes or appropriate moneys for objects not in furtherance of the enumerated powers, the proposed loan and grant to the City of Coeur d'Alene is not for any public use or purpose affecting the general welfare of the United States, it is not a national or general, but a local enterprise.

(c) The project does not constitute a public use within the general welfare of the United States because the project will be of no direct benefit to any persons who do not reside within the City of Coeur d'Alene and will indeed be of no benefit to them because they are already supplied with electricity at reasonable rates prescribed by law.

(2) **COMMERCE CLAUSE.** The construction of the proposed electric plant in Coeur d'Alene is purely an intrastate matter and cannot be justified under the Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3 and the National Industrial Recovery Act, Title II, Sections 202-203, if construed as authorizing same under the Commerce Clause, is unconstitutional.

(3) **TENTH AMENDMENT.** Said project and threatened disbursement of the public funds of the United States in furtherance thereof are further illegal and in violation of the Tenth Amendment to the Constitution of the United States because:

(a) The Federal Public Works Administrator has announced and put into operation and effect as a rule of administration a policy whereby he undertakes to grant loans and to make gifts to municipalities for municipal electric plant construction, unless the privately-owned utility then operating in said municipality will agree to fix rates which are satisfactory to said Public Works Administrator, thereby invading and interfering with the reserved power of the states, in this case the State of Idaho, and particularly in its police power to control public utilities and regulate the rates and service thereof;

(b) No such power was delegated to the Administrator by act of Congress and any attempted delegation thereof would be beyond the power of Congress;

(c) The matter of regulating the rates for service and the quality, character and extent of utility service are reserved to the respective states and the power of control thereof cannot be surrendered or delegated. If the announced policy of said Administrator be approved and the acts and transactions complained of by plaintiff be deemed lawful, said Administrator would be able to put into effect according to his uncontrolled and arbitrary determination a policy of granting or withholding the grant of public funds of the United States for use in establishing utility plants in ruinous competition with existing privately-financed plants unless such privately-financed plants comply with his wishes and dictation with reference to their operation and rates.

(4) UNCONSTITUTIONAL DELEGATION OF POWER BY CONGRESS. Title II, Sections 201-202-203 of the National Industrial Recovery Act unconstitutionally delegates legislative power to the President and to the Public Works Administrator under the direction of the President.

(5) PROPOSED PROJECT NOT COVERED BY ACT. Title II, Section 202-203 of the National Industrial Recovery Act does not authorize the Federal Emergency Administration of Public Works to loan, grant or give moneys of the Federal Government for the building of a municipal Diesel engine generating plant or electric distribution system as

proposed by the City of Coeur d'Alene, such project not being within the enumerated works covered or pretended to be covered by the Act.

## THE DECISION OF JUDGE CAVANAH

Judge Cavanah in overruling the motion to dismiss and in granting an injunction *pendente lite* held:

That the plaintiff's franchise constituted a property right within the protection of the Constitution of the United States against illegal competition;

That the plaintiff had standing to maintain the bill and challenge the constitutionality of an act of congress as it was in immediate danger of sustaining a direct injury to its property rights as a result of the enforcement of the act;

That the application of the National Industrial Recovery Act to the transaction and plan involved in this case cannot be construed as affecting interstate commerce or justified upon the ground that such power is given to the national government under the commerce clause as claimed by the defendants;

The General Welfare Clause does not authorize the appropriation of mony to make a loan and grant to the City of Coeur d'Alene as proposed by the appellants.

Judge Cavanah rejects appellants' contention that the Constitution leaves to the discretion of Congress to pronounce the objects which concern the general welfare and for which appropriations may be made without any limitation as to the objects being in fact general or national. Judge Cavanah expressly holds that this project is a local and not in any sense a national or general enterprise.

The learned judge clearly indicates that he accepts the Madison view as to the correct interpretation of the General Welfare Clause, but he rests his decision in this case not only on that view, but on the ground that under either the Madison view or the Hamilton view of the General Welfare Clause, the National Industrial Recovery Act, as applied to this project, is unconstitutional.

He rejects the contention of the defendants that although Congress may not regulate subject matters on which the Constitution does not authorize legislation, yet it may promote them by appropriation and prescribe how such appropriation shall be applied. His apt language is as follows:

> "Such construction would seem to contradict itself for if Congress is not authorized to legislate upon a certain subject-matter then it would follow that it may not appropriate money to carry out such unauthorized subject-matter. It certainly would not have power in the first instance to authorize the Administrator to construct the system in the City of Coeur d'Alene

and if so then an attempt to appropriate money for the City to do so would be indirectly exercising a power it did not have. To say that Congress has power to declare certain purposes to be national when as a matter of fact they are not and have no relation to the Nation and are strictly local in a state, would defeat and nullify the express provisions of the Constitution limiting the power of Congress. The fact here is an apt illustration of this assumed authority, where the construction of a diesel engine plant and light system in and to be used solely by the inhabitants of the City of Coeur d'Alene, would not in any way be for a national purpose and to assert under the facts in the bill that its construction would relieve unemployment and that an emergency existed does violence to the English language. The true principle is well settled in *Linder vs. United States,* 268 U. S. 5, as follows: 'Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.' " (R., pp. 182-3.)

That the acts threatened are violative of the Tenth Amendment respecting which the court says:

"It is not seriously urged that under the facts alleged in the bill, an emergency in fact exists or to relieve unemployment or distress in the City of Coeur d'Alene, calling for the making the loan and grant. The bill discloses just the opposite, and one would gather from

> it that the real purpose of making the loan and grant is to bring about the construction of a utility and to regulate the rates for electricity for it clearly indicates that the lowering of rates is the primary purpose and object of the National Government in offering aid to the City as the administrator requires of the City to agree to reduce the rates twenty per cent below those now charged by the plaintiff before the loan and grant will be made, and should the plaintiff reduce its rate to meet the Administrator's approval the loan and grant will be refused. No other reason appears why the loan and grant is being made. Obviously direct control of local utilities operating solely within the State and the regulation of rates is in the State and beyond the power of the National Government." (R., p. 184.)

The court holds that the project is also violative of the limitations contained in Section 8, Art. I of the Constitution of Idaho.

## ARGUMENT.

### BY REASON OF A DIRECT AND IRREPARABLE INJURY THREATENED BY APPELLANTS' ACTS PURSUANT TO AN UNCONSTITUTIONAL STATUTE, THE APPELLEE WAS ENTITLED TO INVOKE THE JUDICIAL POWER OF THE UNITED STATES.

Appellee takes it as settled that a Federal taxpayer as such has no standing to maintain a suit to enjoin the unconstitutional expenditure of Federal funds.

*Massachusetts vs. Mellon-Frothingham vs. Mellon,* 262 U. S. 447.

There it was held that a plaintiff suing merely as a taxpayer could not maintain such a suit. Those cases, however, further held that one could invoke the judicial power if he were able to show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the enforcement of such unconstitutional statute and not merely that he suffers in some indefinite way in common with people in general.

Notwithstanding this definite decision, counsel for appellants take the position that appellee can suffer no injury, legal or equitable, resulting from Federal expenditures and that the loan and grant of money by the Public Works Administrator to the City of Coeur d'Alene cannot in any way injure appellee.

The question requires, first, an examination of the rights which the appellee has and which it seeks to protect, and second, whether or not a remedy exists to protect those rights.

Appellee is the owner of an existing valid franchise in the City of Coeur d'Alene which is a property right within the protection of the Constitution of the United States.

*Walla Walla vs. Walla Walla Water Co.,* 172 U. S. 1;

*Boise Artesian Hot & Cold Water Co. vs. Boise City,* 230 U. S. 84;

*Frost vs. Corporation Commission of Oklahoma,* 278 U. S. 515;

*City of Campbell, Mo. vs. Arkansas-Missouri Power Co.,* 55 Fed. (2) 560;

*Missouri Public Service Co. vs. City of Concordia,* 8 Fed. Supp. 1.

It is admitted that appellee has a valid franchise in the City of Coeur d'Alene. It is not an exclusive franchise and it is subject to legal competition, but it is not subject to illegal competition and the company is entitled to be protected against illegal competition.

*City of Campbell, Mo. vs. Arkansas-Missouri Power Co., supra;*

*Missouri Public Service Co. vs. City of Concordia, supra;*

*Iowa Southern Utilities Co. vs. Cassill* (C. C. A.) 69 Fed. (2) 703;

*Gallardo vs. Porto Rico Ry. L. & P. Co.,* 18 Fed. (2) 918-922 (C. C. A.);

*Missouri Public Service Co. vs. City of Concordia, supra.*

In *Frost vs. Corporation Commission,* supra, it was contended that the appellant has no property right to be affected by the operations of the plain-

tiff and therefore no standing to invoke the provisions of the Fourteenth Amendment or to appeal to a court of equity. Mr. Justice Sutherland says:

> "It follows that the right to operate a gin and to collect tolls therefore, as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the 14th Amendment.
>
> * * * * * * * *
>
> "Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the City of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. (Citing cases.) The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law."

In *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.,* supra, the court said:

> "It is urged that, inasmuch as the plaintiff's franchise was not an exclusive one, it had no right to maintain this suit for injunctional relief. * * * As the owner of this franchise,

> however, the plaintiff was entitled to relief against the illegal acts of others who might assume to exercise the privilege conferred upon it by its franchise. A franchise is property, and, as such, is under the protection of the law, and without express words it is exclusive as against all persons acting without legal sanction. True, plaintiff's franchise was not exclusive in the sense that the city might not grant similar right to another, yet it was exclusive against any one who assumed to exercise the privilege granted the plaintiff, in the absence of authority or in defiance of law. (Citing cases.) We are clear that the plaintiff, as the holder of this franchise to maintain and operate the plant in defendant city, was entitled to protection against all illegal competition."

In the above case, the suit was brought to enjoin the city from carrying out a contract for the purchase of machinery for a municipal light plant, and to restrain the city from operating the same, it being claimed that the action was violative of certain provisions of the Missouri Constitution.

In *Iowa Southern Utilities Co. vs. Cassill, supra,* the Circuit Court of Appeals for the Eighth Circuit following its earlier decision in *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.,* held that the plaintiff, the owner of a franchise in the town of Lenox, was entitled to protection against unlawful competition and to enjoin the municipality from constructing a plant, if its action in so doing was illegal or unconstitutional. However, upon the merits, the court held that under the Constitution of Iowa, the contract was not illegal.

In each of the cases cited, the courts recognized that such illegal competition can only result in serious and direct injury to the existing utility.

In this case, the bill alleges, and for the purpose of this hearing it is admitted, that the proposed competition of the municipality will injure the property of appellee. The appellee, therefore, clearly shows that it has an interest and property right which is entitled to protection; that it is subject to special and direct injury and, therefore, is entitled to challenge the constitutionality of the act which will result in such injury.

The cases cited above involve the protection of property under the due process clause of the Fourteenth Amendment. The same rule applies to injury brought about by the Federal Government or under Federal statutes since the due process clause of the Fifth Amendment is a like restriction. In *Heiner vs. Donnan,* 285 U. S. 312, Mr. Justice Sutherland, on page 326, says: "The restraint imposed upon legislation by the due process clauses of the two amendments is the same."

Counsel for the appellant Ickes contends that the appellee suffers no injury from the loan and grant of moneys by the Public Works Administration, but whatever injury it suffers arises from the use by the defendant city and its officers of the money so loaned and granted and not from the loan and grant. If the loan and grant are for the specific purpose

of constructing a municipal plant and the funds cannot be used for any other purpose, it seems illogical to say that the competition arising from a municipal plant financed by the Public Works Administration and the construction of the municipal utility are not so bound up that they must stand or fall together.

### REMEDIES AVAILABLE TO PLAINTIFF

Attempt is made by counsel for appellants to distinguish *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.* upon the ground that the City of Campbell was trying to act in violation of the Constitution of Missouri, which unlawful act would result in injury to the plaintiff. The franchise there, as here, was not exclusive.

Counsel for appellant Ickes also contends that the *Campbell* case is authority for the proposition only that if the taxing power is illegally exercised the proposed competition is illegal, and it is asserted in his brief with respect to that case that the competition causing the injury was illegal; while here the claimed illegality is not in the competition, but in the financing thereof. Counsel is forced to illogical and unreasonable argument to support his cause. The injury which appellee seeks to prevent is illegal competition resulting from the conduct both of the defendant municipality and its officers and the defendant Ickes, in violation both of the Constitution of the United States and of the Constitution of the State of Idaho.

In *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.* and in *Iowa Southern Utilities Co. vs. Cassill,* the court recognized that illegal competition by the construction of a municipal plant necessarily results in serious and direct injury to the existing utility. In both of those cases that question was passed upon before inquiring into the legality of the proceedings, which in the one case was challenged as being violative of a provision in the Missouri Constitution, and in the other as violative of a similar provision in the Iowa Constitution. In the *Campbell* case, on the merits, it was held that the proceedings were violative of the Missouri Constitution. In the *Iowa* case it was held that they were not violative, but in both cases the right of the plaintiff to maintain the action was recognized. In both the above cases, the question of illegal competition arose out of the claimed illegality in the financing of the plant.

Appellee brings itself within the rule announced in both of those cases as well as the rule announced in *Massachusetts vs. Mellon.* It is able to show that it has sustained or is immediately in danger of sustaining a direct injury as the result of an enforcement of an unconstitutional statute—in this case a statute violative of the Federal Constitution.

Attempt is also made to distinguish *Frost vs. Corporation Commission of Oklahoma,* on the ground that the injury complained of there and the illegal

competition sought to be restrained arose from a violation of a statute of Oklahoma.

In this case, appellee asserts that the plan for financing the municipal plant involves not only a violation of the Idaho Constitution and statutes but a violation of the Federal Constitution and statutes.

It is a settled principle that an injurious act suffered or threatened under an unconstitutional statute entitles one who is injured to an injunction.

*Pierce vs. Society of Sisters of Holy Names,* 268 U. S. 510;

*Adkins vs. Children's Hospital,* 261 U. S. 525;

*Philadelphia Co. vs. Stimson,* 223 U. S. 605.

The first case involves the due process clause of the Fourteenth Amendment. *Adkins vs. Children's Hospital* involves the due process clause of the Fifth Amendment. The last two cases involve an injunction against a Federal officer from carrying out the provisions of an unconstitutional statute.

In *Philadelphia Co. vs. Stimson,* Justice Hughes said:

> "Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the com-

> plainant, which is the basis of the decree. * * * And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property."

## PLAINTIFF MAY ENJOIN UNAUTHORIZED APPROPRIATION, EVEN IF ACT IS CONSTITUTIONAL

If, however the statute is not unconstitutional as violative of the General Welfare Clause or violative of the Constitution as an unlawful delegation of power, still, this suit may be maintained, provided the appropriation and the loan and grant to the City of Coeur d'Alene is not authorized by the National Industrial Recovery Act. This is founded upon the principle that one who may suffer irreparable injury from the violation of a prohibitory statute, or from an act otherwise unlawful or tortious, is entitled to injunctive relief.

> *Goldfield Con. Min. Co. vs. Richardson,* 194 Fed. 198;
>
> *In re Debs,* 158 U. S. 564.

*Goldfield Consolidated Mines Co. vs. Richardson* sought to enjoin defendants from the purchase of gold ore stolen from complainants' mines. Plaintiff alleged that the defendants purchased the ore from the employes of the plaintiffs who had stolen the

same from plaintiffs. Purchasing the stolen ore with knowledge that it was stolen was forbidden by criminal statutes. The defendants maintained that a restraining order could not be granted to enforce such a statute. The court held that purchasing the stolen ore is as clearly and distinctly wrong as the original theft; that actions at law might be had for each wrong, but they would not provide adequate remedies and that an injunction should issue to enjoin acts which were destructive of property rights even though they in themselves were criminal.

If the proposed loan and grant is not contemplated by Title II of the National Industrial Recovery Act, the appropriation will violate the constitutional provisions against drawing money from the treasury except in consequence of appropriations made by law.

Const., Art. I, Sec. 9, Clause 7.

It would also violate the provisions of an act of Congress prohibiting the expenditure of money in excess of the appropriations made by Congress, and under such statute will constitute a misdemeanor.

Title 31, USCA, Sec. 665.

The cases which have been cited and particularly *Philadelphia vs. Stimson,* settle the doctrine that Federal officers acting in excess of statutory authority or under an unconstitutional statute act as individuals and that a suit against them is not a suit

against the United States. Therefore, if the provisions of the National Industrial Recovery Act are unconstitutional, or if the defendant Ickes is acting in excess of statutory authority the appellee had a clear right to maintain a suit to enjoin the consummation of the loan and gift.

## APPELLEE IS ENTITLED TO MAINTAIN AN ACTION AGAINST THE MUNICIPALITY AND ITS OFFICERS

A municipality and its officers certainly can be enjoined from carrying out an illegal and unconstitutional application of public funds. If the grant and loan are unconstitutional, there is a misapplication of funds. Appellee could have enforced its right against the municipality and its officers alone. In *Missouri Public Service Co. vs. City of Concordia, supra,* a case in which the Federal Administrator was not a party, the court said:

> "It is obvious that the defendants propose to construct a plant because of plans and aid promoted, formulated, and granted by the Administrator of the Federal Emergency Administration of Public Works. If this be illegal, then, upon the bill, plaintiff is entitled to the relief sought. By appropriate averments it has challenged the legality of the project because of the circumstance that the Congress, in promoting the project, has exceeded its constitutional powers, or that the Administrator was acting in excess of his powers."

The present suit was brought before the loan and grant had been consummated. What reason can exist why the suit cannot be brought against the

consummation of the illegal plan to finance the construction of a competing municipal plant as properly and readily as it could be brought against the construction of the plant itself? That such action may be brought is supported by *City of Campbell, Mo. vs. Arkansas-Missouri Power Co., Iowa Southern Utilities Co. vs. Cassill,* and *Missouri Pub. Service Com. vs. City of Concordia.*

*City of Allegan vs. Consumers' Power Co.,* 71 Fed. (2) 477 is a case in which the plaintiff sued merely as a taxpayer.

In *Puget Sound Power & Light Co. vs. City of Seattle,* 291 U. S. 619, the Puget Sound Company denied the right of the city to tax it where it was a competitor with the city. The Supreme Court held that the city had the right so to tax it. The competition which was complained of was held to be lawful.

Two other cases are cited—*Missouri Utilities Co. vs. City of California,* 8 Fed. Supp. 454, and *Arkansas-Missouri Power Co. vs. City of Kennett,* decided February 25, 1935, in the District Court for the Southeastern Division of the Eastern District of Missouri. These cases hold that an existing utility may not maintain an action against a municipality to enjoin the consummation of an unconstitutional grant and loan of Federal money and are at variance with the cases which we have cited and the decision of Judge Cavanah in this case.

In *Missouri Utilities Co. vs. City of California,* the Public Works Administrator intervened and was made a party defendant. The District Court in its opinion held that under the National Industrial Recovery Act appropriations made by the Public Works Administration to assist municipalities in the construction of electric generating and distribution systems are constitutional and also reaches the conclusion that even if such appropriations were invalid under the General Welfare Clause, an existing utility would have no right to raise that question or to maintain a suit for injunctive relief. With respect to the General Welfare Clause, we shall refer to the case elsewhere. The Court undertakes to base its conclusion that no remedy exists upon the ground that there was no taking under the Fourteenth Amendment since the municipality was not engaged in an unlawful undertaking and that there was no taking by the Federal Government under the Fifth Amendment since the appropriation of moneys for the construction of the plant could not constitute a taking. The court argues in reaching this conclusion that a donation or gift by John D. Rockefeller of moneys to the City of California to build a plant could not constitute a taking of the property of the utility or if one owned a library in the City of California and made a profit by renting books to the citizens and Andrew Carnegie gave money to the city for the building of a free library that would not be taking the plaintiff's property and that neither the utility nor the owner of the

library could object. It is conceded in the opinion of the court that such gifts by Rockefeller or Carnegie would be lawful, that therefore, the taking of the plaintiff's property would be lawful. From this, it is argued that if Mr. Rockefeller or Mr. Carnegie might have lawfully provided the money and caused the construction of the competing municipal utility or free library, then the existing utility or the owner of the library is without remedy against anyone unlawfully causing such competition and resulting damage. If that argument is sound, the decisions in *Frost vs. the Corporation Commission* and *City of Campbell, Mo. vs. Arkansas-Missouri Power Company,* were both wrong and in *Iowa Southern Utilities Co. vs. Cassill; Oklahoma Utilities Co. vs. City of Hominy* and *Guadeloupe vs. Porto Rico Light & Power Co.* the courts should not have inquired into the question of the legality or lawfulness of the competition. The argument condemns itself.

Another argument advanced by the court in the *California case* is that the injury to the utility is produced by the building and operation of the competing utility and not by the loan or gift which alone made its construction possible. By the terms of the National Industrial Recovery Act, the loan and grant are made for a required use and a contract requiring the expenditure of the money for that use is required by the Administrator. How can the loan and grant be separated from the building

of the plant? The loan and grant contract between the Public Works Administration and the city provides the manner of construction, many terms with respect to method, etc., as well as an attempt to control rates.

Elsewhere in his opinion the District Judge says that what is referred to as a gift is not a gift at all but is a grant to the City of California, annexed to which are onerous conditions. The proposed loan and grant contract in this case (Ex. D., R., p. 91) shows that the Public Works Administrator assumes to control and regulate the expenditures of the city.

The loan and the gift without which it is conceded the city cannot build this plant (as it proposes to expend more than the amount authorized by the voters) shows that the loan and grant and the construction are part and parcel of one and the same transaction.

The District Court in the *California* case further takes a narrow view of what constitutes the taking of private property by the Federal Government. It assumes almost that physical taking is essential and yet, on page 465 the Court, in its opinion, concedes that taking the facts as alleged in the bill as true, the value of the property of plaintiff will be lessened and the construction of the municipal plant may altogether destroy its value and then argues that the appropriation of money by the United

States, although to be used for that specific purpose does not hurt the plaintiff.

Any action which illegally deprives property of value in whole or in part is a deprivation of property without due process of law.

*Smyth vs. Ames,* 169 U. S. 466.

In that great case the court asserted its power at page 527 as follows:

> "The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

We may further say that even if there is no deprivation of property within the meaning of the Fifth and Fourteenth Amendments, if the competition is unlawful, then the utility has a right to enjoin such unlawful and illegal competition. To say that there is a right without remedy denies the existence of the right.

In *Arkansas-Missouri Power Company vs. Kennett,* in the District Court for the Eastern District of Missouri, Judge Faris held that the utility had no standing to maintain an action. In the brief of

Counsel for the Administrator it is said that he is the Judge who wrote the decision in the *Campbell* case. That is in error. The *Campbell* case was tried before him as District Judge but he was not a member of the Court of Appeals at the time it was decided nor did he participate in the hearing in the Court of Appeals. He concedes that the plaintiff will be hurt as a necessary and direct consequence of what the defendant Ickes proposes to do and which he says the city has the legal power to do and proposes doing. He argues that even if the National Industrial Recovery Act had never been passed, the City of Kennett could and undoubtedly would have built the plant with the proceeds of the bonds which had been authorized. He concedes that the $30,000.00 grant (which he calls gratuitous) is not in the same category as the money received from the bonds, is a mere fortuitious thing. (It appears that the issue of bonds authorized was less than the total loan and grant.) In this respect he disagrees with the conclusion in the *City of California* case. He holds that the failure of the gift would not afford an insurmountable barrier to the construction of the plant and he concludes that the plaintiff's hurt will accrue directly from the City of Kennett doing what it had power to do, and that the threatened act of defendant, Ickes, is not the direct cause of the thing of which the plaintiff complains. Here, again he undertakes to separate the furnishing of the money from the construction of the plant, all of which constitute one and the same transaction. The

judge undertakes to distinguish *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.* by saying that the *City of Campbell* was trying to do an act in the teeth of the Constitution of Missouri, which unlawful act would result in injury to the plaintiff there. He disregards the fact that in the case before him the defendants were trying to do an act in the teeth of the Constitution of the United States—to use moneys of the United States appropriated in violation of the Constitution of the United States under an act which was further unconstitutional in undertaking to delegate power to an executive officer which Congress could not delegate, and further that the moneys were being used for purposes which are not within the provisions of Sections 202-203 of Title II of the National Industrial Recovery Act. He undertakes further to say that if the action of plaintiff be carried to a successful conclusion such result will stop the defendant city only until it shall be able to find another buyer for its bonds. In other words, that even if the acts of the defendants are illegal and violative of the Federal Constitution, the utility should be denied relief against such acts, even though it is concededly injured, because perchance the moneys may be found elsewhere and acquired in a legal way. That case is now on appeal.

## POWERS OF FEDERAL GOVERNMENT

The government of the United States is one of delegated powers, its authority defined and limited by the Constitution.

*Martin vs. Hunter's Lessee,* 1 Wheaton, 304;

*Kansas vs. Colorado,* 206 U. S. 46 at pages 89 to 91;

*Calder vs. Bull,* 3 Dallas, 386;

*United States vs. Cruikshank,* 92 U. S. 542;

*United States vs. Harris,* 106 U. S. 629;

*Ex parte Milligan,* 4 Wall. 2;

*Houston vs. Moore,* 5 Wheaton, 1, 48.

Perhaps the finest statement of the powers of the Federal Government and the limitations upon its power is found in *Kansas vs. Colorado,* 206 U. S. 46 at pages 89 to 91:

> "But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. *This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted.* With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the

future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit: 'the people.' Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it—'We, the people of the United States,' not the people of one state, but the people of all the states; and Article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adoptd the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article 10 is not to be shorn of its meaning by any narrow or technical construction but is to be considered fairly and liberally so as to give effect to its scope and meaning."

No finer statement of constitutional limitations has ever been made than that of Grover Cleveland in his Veto Message of March 2, 1889, returning without approval a bill to credit and pay to the several states and territories and the District of Columbia all the moneys collected under the direct tax levy by Congress approved August 5, 1861, where he said:

> "It is my belief that this appropriation of the public funds is not within the constitutional power of the Congress. Under the limited and delegated authority conferred by the Constitution upon the General Government the statement of the purposes for which money may be lawfully raised by taxation in any form declares also the limit of the objects for which it may be expended. * * *
>
> "The expenditure cannot properly be advocated on the ground that the general welfare of the United States is thereby provided for or promoted. This 'general welfare of the United States,' as used in the Constitution, can only justify appropriations for national objects and for purposes which have to do with the prosperity, the growth, the honor, or the peace and dignity of the nation.
>
> "A sheer, bald gratuity bestowed either upon States or individuals, based upon no better reason than supports the gift proposed in this bill, has never been claimed to be a provision for the general welfare. More than fifty years ago a surplus of public money in the Treasury was distributed among the States; but the unconstitutionality of such distribution, considered as a gift of money, appears to have been conceded, for it was put into the State treasuries under the guise of a deposit or loan, subject to the demand of the Government."

*Messages and Papers of the Presidents,* Vol. VIII, pp. 837, 839-40.

## GENERAL WELFARE CLAUSE

*Views of Appellee*

(a) That under the General Welfare Clause of the Constitution, Congress has no power to tax or appropriate moneys for objects not within the enumerated powers expressly delegated to the Federal Government.

(b) That even if it should be held that Congress has power and the General Welfare Clause authorizes Congress to levy taxes and appropriate moneys for objects not within the enumerated powers expressly delegated to the Federal Government, still the proposed loan and grant in this case violates the Constitution because in any event such taxation and appropriation must be restricted to purposes of general not local benefit, and the proposed construction of a generating plant and distribution system in the City of Coeur d'Alene is not for any public use or purpose affecting the general welfare of the United States.

*Appellants' Views*

Appellants maintain that Congress has power to appropriate money for the promotion of the general welfare and is not restricted in so doing to purposes germane to other delegated powers; that Congress has the power to appropriate money to further

the so-called general welfare for purposes as to which the Constitution does not authorize legislation, that it is left to the discretion of Congress to pronounce what objects concern the general welfare and for which, under that description, appropriation of money may be made; and that such power cannot be reviewed by the courts.

So far as the Supreme Court is concerned, the interpretation of the General Welfare Clause is an open constitutional question. That court has never construed it.

Two views have been advanced as to the correct interpretation—one referred to in the literature of the Constitution as the "Madison view", and the other as the "Hamilton view".

*Judge Cavanah's View*

Judge Cavanah in this case holds that the clause is not a grant of power, but a limitation on the power to tax, adopting the Madison view. But he aptly points out that "the interpretation of the phrase 'general welfare' given by Hamilton limits its operation in the appropriation of money by Congress to matters general and not local." (R., p. 180.)

He says:

> "The construction urged by the defendants, that although Congress may not regulate subject-matters on which the Constitution does not authorize legislation, yet it may promote them

by appropriation and prescribe how such appropriation shall be applied, as the Constitution leaves it to the discretion of Congress to pronounce upon the objects which concern the general welfare and for which appropriations of money is requisite and proper without any limitation as to the objects being in fact general—such construction would seem to contradict itself, for if Congress is not authorized legislate upon a certain subject-matter, then it would follow that it may not appropriate money to carry out such unauthorized subject-matter. It certainly would not have power in the first instance to authorize the Administrator to construct the system in the City of Coeur d'Alene, and, if so, then an attempt to appropriate money for the city to do so would be indirectly exercising a power it did not have. To say that Congress has power to declare certain purposes to be national, when as a matter of fact they are not and have no relation to the nation and are strictly local in a state, would defeat and nullify the express provisions of the Constitution limiting the power of Congress. The fact here is an apt illustration of this assumed authority, where the construction of a Diesel engine plant and light system, in and to be used solely by the inhabitants of the City of Coeur d'Alene, would not in any way be for a national purpose, and to assert under the facts in the bill that its construction would relieve unemployment, and that an emergency existed, does violence to the English language. The true principle is well settled in *Linder vs. United States,* 268 U. S. 5, as follows: 'Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. And we accept as established doctrine that any provisions of an

act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced.' " (R., pp. 182, 183.)

*The Views of Madison and Hamilton*

Madison's view as to the correct interpretation of the General Welfare Clause is stated in the Federalist No. XLI.:

"Some who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even

to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms 'to raise money for the general welfare.'

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even seperated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.

The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the articles of Confederation. The objects of the Union among the States, as described in article third, are, 'their common defense, security of their liberties,

and mutual and general welfare.' The terms of article eighth are still more identical: 'All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury,' etc. A similar language again occurs in article ninth. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation."

The Hamilton view is found in his Report on Manufactures as follows:

"It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money.

> The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object to which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot.
>
> No objection ought to arise to this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication."

Hamilton limited the phrase by saying that the object to which the appropriation of money is to be made must be general and not local.

It is not our purpose to extend the discussion of the difference between these two views. Under either view, th appropriation and grant and loan which is enjoined in this case is unconstitutional. The Madison view, however, is supported historically by the highest authority and has generally been accepted. It would be impracticable to incorporate within this brief these citations. We shall endeavor to collect them in an appendix for the convenience of the court.

The Madison view is supported by the following authorities:

The State Papers of Jefferson, Madison, Monroe, Jackson, Pierce and Cleveland, referred to hereinafter.

The Making of the Constitution by Charles Warren;

Congress as Santa Claus by Charles Warren;

Our National Constitution: Provisions for the General Welfare, by Albers, 9th Boston University Law Review, 152;

John Randolph Tucker on the Constitution, Vol. I, pp. 478-480;

Virginia Resolutions of January 8, 1800, Writings of James Madison, Hunt Edition, Vol. VI, p. 341;

Madison's Letter to Andrew Stevenson of Nov. 27, 1830, Writings of James Madison, Hunt Edition, Vol. X, p. 411;

Madison's Letter to Edmund Pendleton, Writings of James Madison, Vol. 1, p. 545; Vol. IV, p. 171.

Opposed to this generally accepted view are the writings of Corwin, The Twilight of the Supreme Court and an article by him in the Harvard Law Review; Willoughby on The Constitutional Law of the United States and the views expressed by Story.

As Charles Warren points out in the The Making of the Constitution, in considering of the validity of Judge Story's interpretation, it must always be born in mind that Story's Commentaries was published prior to the publication of Madison's Notes

on Debates and without any knowledge of the discussions in the Convention, other than the records of the motions and votes contained in the Journal of the Convention. While Story adopted the view of Hamilton, he, nevertheless, was forced in concluding his discussion to say:

> "The truth is, (as the historical review also proves), that after it had been decided that a positive power to pay the public debts should be inserted in the Constitution, and a desire had been evinced to introduce some restriction upon the power to lay taxes, in order to allay jealousies and suppress alarms, it was (keeping both objects in view) deemed best to append the power to pay the public debts to the power to lay taxes; and then to add other terms, broad enough to embrace all the other purposes contemplated by the Constitution. Among these none were more appropriate than the words 'common defense and general welfare,' found in the Articles of Confederation, and subsequently with marked emphasis introduced into the preamble of the Constitution. To this course no opposition was made, because it satisfied those who wished to provide positively for the public debts, and those who wished to have the power of taxation co-extensive with all constitutional objects and power." (Sec. 930, Story on the Constitution, 4th Ed., Vol. 1.)

We may close this discussion by referring to the fact that of all the men who knew or should have known the intent of the framers of the Constitution Madison stood first. He attended conscientiously the meetings of the Convention from the time it opened until it closed. Hamilton, on the other

hand, after the defeat of his plan for a Federal Government, returned to his practice in New York, and thereafter gave little attention to the proceedings of the Convention. It is true that after the Constitution was adopted by the Convention, Hamilton did great service in securing its ultimate ratification. It will not be denied that if it had been thought that the general government was invested with such power as is now claimed by appellants, the Constitution would never have been adopted.

We have incorporated some discussion of the question of the construction of the General Welfare Clause as viewed by Madison and by Hamilton. This is deemed proper for a full presentation of the problem. As the court below held and as we maintain, Madison correctly interpreted the clause, but as the court below held and as we maintain, that is not decisive of the question in this case, because even under the Hamilton interpretation, the project under consideration must be condemned because it is not for a national or general but for a local purpose.

### JEFFERSON'S VIEW

We desire to refer to the view of Jefferson, expressed in his opinion on the constitutionality of the First Bank of the United States:

> "To lay taxes to provide for the general welfare of the United States is to lay taxes for the

purpose of providing for the general welfare. For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. Congress are not to lay taxes ad libitum, for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumeration of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil; it would be also a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly, no such universal power was meant to be given them. It was intended to lace them up strictly within the enumerated powers, and those without which, as means, these powers could not be carried into effect."

*The Writings of Thomas Jefferson,* Library Ed., Vol. 3, p. 148.

He definitely adopted the same view in his message to Congress on December 2, 1806.

It is said by commentators that Monroe originally adopted the Madison view, but finally by his message of May 4, 1822, in connection with the veto of a bill for the preservation and repair of the Cumberland Road, changed his views. That change is of no comfort or avail to appellants, for he distinctly stated:

> "My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general, not local, national, not State, benefit."

So, even if one accepted the Hamilton view or the later opinion of Monroe, the appellants are not aided, because the limitations expressed by Hamilton and Monroe are as fatal to their cause as the interpretation of Madison.

*Charles Evans Hughes' Views*

One other citation. Our present Chief Justice before his appointment presented an argument before the Federal Oil Conservation Board with reference to the power of Congress to control the production or refining of oil and therein discussed the General Welfare Clause. He said:

> "It may therefore be safely taken for granted that under the powers to regulate commerce Congress has no constitutional authority to control the mere production of petroleum on lands (other than Indian lands) within the territory of a State. All plans for requiring

unit operation or otherwise, which involve the assertion of such a power on the part of Congress do not require discussion. They proceed from an utterly erroneous conception of Federal power. It does not further the policy of conservation to take up the public attention with futile proposals which disregard the essential principles of our system of government." * * *

"I am aware that it has been suggested that such Federal power to control production within the states might be asserted by Congress because it could be deemed to relate to the provision for the common defense and the promotion of the general welfare."

"Reference is sometimes made in support of this view to the words of the preamble of the Federal Constitution. But as Story says 'The preamble never can be resorted to to enlarge the powers confided to the general government or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given." * * *

"The suggestion to which I have referred is an echo of an attempt to construe Article 1, Section 8, Subdivision 1 of the Constitution of the United States, not as a power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States,' but as conferring upon Congress two distinct powers, to-wit: (1) the power of taxation and (2)

the power to provide for the common defense and the general welfare. In this view, it has been urged that Congress has the authority to exercise any power that it might think necessary or expedient for the common defense or the general welfare of the United States. Of course, under such a construction the government of the United States would at once cease to be one of enumerated powers and the powers of the states would be wholly illusory and would be at any time subject to be controlled in any matter by the dominant Federal will exercised by Congress on the ground that the general welfare might thereby be advanced. That, however, is not the accepted view of the Constitution. (1 Story on the Constitution, Secs. 907, 908; 1 Willoughby on the Constitution, Sec. 22.) The government of the United States is one of enumerated powers and is not at liberty to control the internal affairs of the states respectively such as production within the States, through assertion by Congress of a desire either to provide for the common defense or to promote the general welfare." (Quotation from *Panama Refining Co. vs. Ryan,* 5 Fed. Supp. 639-647.)

### THE PROJECT IS LOCAL IN CHARACTER

Even if the Hamilton view were adopted and it was held that the General Welfare Clause authorizes Congress to levy taxes and appropriate moneys for the general welfare of the United States, though not in furtherance of the enumerated powers, still, the proposed loan and grant to the City of Coeur d'Alene does not come within the definition of Ham-

ilton, because even under his view the appropriation of moneys must be for objects which are national—not local—in character.

The facts set forth show that this grant and loan is for a small local Diesel engine generating plant and distribution system in the City of Coeur d'Alene, purely intrastate.

The levying of taxes and appropriation of moneys are but incidental purposes of government. Taxes and appropriations are the means through which government exercises its powers. The general government, the state governments, the municipal governments are each granted certain powers. In the exercise of those powers, each may tax and may make appropriations, but such taxation and such appropriation is and must be limited to the purposes for which the particular government is authorized. This is involved in the fundamental distinction between the powers of the Federal Government and the powers of the state governments. If the power to tax or to appropriate moneys existed independent of and beyond those granted powers, then through the exercise thereof the general government could assume to itself all of the prerogatives of the states and of the subdivisions of the states.

If the general government in this case under the guise of the power to tax and to appropriate moneys, can loan 70% and grant 30% of the cost of a local lighting system in the City of Coeur

d'Alene and impose upon the city conditions with respect to rates, services, etc., then it could as well appropriate 30% of the cost of running the municipal government and in connection therewith provide by contract the manner in which the municipal government should be operated, and, according to the views of the appellants, that would be beyond the control of the judicial power.

By the same rule, the general government, for the purpose of carrying out some assumed "socially desirable" program could subsidize a newspaper in Coeur d'Alene or furnish funds for a municipal newspaper to spread the good word around, and this perversion of the Federal power and waste of Federal money would, according to appellants, be impregnable to judicial control. Can it be claimed that because Congress or an executive officer declared that it was for the general welfare to have a good hotel in Coeur d'Alene that moneys of the Federal Government could be expended therefor?

Franklin Pierce in his Veto Message of May 3, 1854, said:

> "To say that it was a charitable object is only to say that it was an object of expenditure proper for the competent authority; but it no more tended to show that it was a proper object of expenditure by the United States than is any other purely local object appealing to the best sympathies of the human heart in any of the States. And the suggestion that a school for the mental culture of the deaf and

dumb in Connecticut or Kentucky is a national object only shows how loosely this expression has been used when the purpose was to procure appropriations by Congress. It is not perceived how a school of this character is otherwise national than is any establishment of religious or moral instruction. All the pursuits of industry, everything which promotes the material or intellectual well-being of the race, every ear of corn or boll of cotton which grows, is national in the same sense, for each one of these things goes to swell the aggregate of national prosperity and happiness of the United States; but it confounds all meaning of language to say that these things are 'national', as equivalent to 'Federal', so as to come within any of the classes of appropriation for which Congress is authorized by the Constitution to legislate."

*Messages and Papers of the Presidents,* Vol. V., p. 255.

These matters of local concern are not within the powers granted to the Federal Government. In *Miles Planting & Mfg. Co. vs. Carlisle,* 5 App. Cas., Dist. of Columbia, p. 138, the court said:

"We think the authorities cited above establish beyond question that the power of taxation, in all free governments like ours, is limited to public objects and purposes governmental in their nature. No amount of incidental public good or benefit will render valid taxation, or the appropriation of the revenues to be derived therefrom, for a private purpose."

The power of a legislature to levy or to authorize the levy of a tax, and to create or authorize the

creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose.

*Dodge vs. Mission Township,* 107 Fed. 827.

In that case, the court held that the question whether a tax or public debt is for a public or private purpose is not a legislative but a judicial function; that a legislature cannot make a private purpose a public purpose, or draw to itself or create the power to authorize a tax or a debt for such a purpose, by its mere fiat. An act was under consideration in that case for the promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup, which the court held a private and not a public purpose.

In *Savings & Loan Assn. vs. Topeka,* 20 Wall. 655, the Supreme Court held that there is no such thing in the theory of our governments, state and national, as unlimited power in any of their branches; that the executive, legislative and judicial departments are all of limited and defined powers; among these is the limitation of the right of taxation, namely, that it can be used only in aid of a public object, an object which is within the purpose for which governments are established.

## PRACTICE OF CONGRESS

If anything were needed to show the weakness of appellants' position, it is but necessary to examine the arguments presented to support this proceeding.

The position of appellants is that the clause does not restrict appropriations to the subject-matters upon which Congress may legislate; that Congress may declare what constitutes the general welfare so long as that power is exercised in levying taxes and making appropriations, and that such power cannot be reviewed by the courts.

The practice of Congress to appropriate money for purposes not authorized by the Constitution is urged as supporting this position. The brief of appellant Ickes lists a large number of these alleged appropriations.

That too much weight should not be given to such practice of Congress could not be better shown than in the legislative history of the National Industrial Recovery Act.

Appellants now rely upon the General Welfare Clause as authorizing, and empowering Congress to pass the legislation. In hearings before the Committee on Finance of the United States Senate on the Act, Senator Wagner, of New York, who had charge of the matter, admitted that such power as was given under the act came from the Commerce Clause and not from the General Welfare Clause, as is shown by the following:

"SENATOR CONNALLY: You are basing your whole power to do this thing on the interstate commerce clause, are you not?

SENATOR WAGNER: Yes; absolutely.

SENATOR COUZENS: And welfare.

SENATOR WAGNER: And welfare, to a limited extent.

SENATOR CONNALLY: The welfare clause doesn't mean much so far as power is concerned?

SENATOR WAGNER: It refers to appropriations."

Appropriations entirely improper will no doubt be found. Interested congressmen or groups seeking the appropriation are little concerned with the constitutional basis for them, and many escape attack because there is no one with legal right to complain. A taxpayer as such cannot enjoin them. Again in most cases there is no one with sufficient interest to complain. Many of them are for the relief of distress and suffering and have no injurious effect upon the business and property rights of the people. A careful analysis of such cases will disclose that most of them have been justified either wholly or in part upon one of the enumerated powers, such as the power to take land for the purpose of a custom house, which was held in *Chappell vs. United States,* 160 U. S. 499, to come within the power to control navigation, or upon the ground

that where legislation is *in fact* within an enumerated power, it cannot be successfully attacked because it also incidentally or collaterally serves a purpose not within the powers of the Federal Government as in *Arizona vs. California,* 283 U. S. 423.

But the Supreme Court has said that even such practice, no matter how long continued, cannot establish a precedent against the conviction that such legislation is clearly unconstitutional. In *Myers vs. United States,* 272 U. S. 52, the court said:

> "In spite of the foregoing Presidential declarations, it is contended that since the passage of the Tenure of Office Act, there has been general acquiescence by the Executive in the power of Congress to forbid the President alone to remove executive officers, an acquiescence which has changed any formerly accepted constitutional construction to the contrary. Instances are cited of the signed approval by President Grant and other Presidents of legislation in derogation of such construction. We think these are all to be explained not by acquiescense therein, but by reason of the otherwise valuable effect of the legislation approved. Such is doubtless the explanation of the executive approval of the Act of 1876, which we are considering, for it was an appropriation act on which the section here in question was imposed as a rider.
>
> "In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of

> the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time as showing general acquiescence in the legislative assertion of a questioned power is minimized."

In *Miles Planting & Mfg. Co. vs. Carlisle,* 5 Appeal Cases, District of Columbia, 138, at page 161, it is said:

> "All such acts, however, no matter how worded or devised have met with determined opposition and denial of power at all times; and it cannot be said that they have ever received general consent or acquiescence. The fact that moneys have often been paid out under acts of doubtful or questionable validity can have no great weight, under a system where the question, by reason of difficulties before alluded to, is so hard to be raised in an effective manner.
>
> "But if there had been a practice by Congress, uniform and generally acquisced in, our opinion is so clearly against the validity of this act that we could not be controlled by it in the performance of our duty. No time, no acquiscence, no estoppel runs against the people under the protection of our written Constitution."

The case was one brought by a sugar planter who sought mandamus to compel the Secretary of the Treasury to pay the sugar bounty authorized by the McKinley bill. The government contended, among

other things, that it was beyond the power of Congress to appropriate money for such a bounty. The court held the statute was unconstitutional upon the ground that the power of the Federal Government to appropriate money under Article I, Section 8, Clause 1 is limited to a governmental purpose—that is—an authorized governmental function of the Federal Government.

This is the same act which was the subject of investigation in *Field vs. Clark,* 143 U. S. 649, in which the court found it unnecessary to pass upon the constitutional question.

In *United States vs. Boyer,* 85 Fed. 425-432, upon this question the court said:

> "No case has been cited tracing the power to enact any statute to the general welfare clause above quoted, and I do not believe any can be. The learned counsel, in this connection, has cited various acts of congress of a nature quite similar to the one in question, but no number of statutes or infractions of the constitution, however numerous, can be permitted to import a power into the constitution which does not exist, or to furnish a construction not warranted. They, too, must stand or fall, when brought in question, by the same principles which are to be applied alike in all cases."

## ATTITUDE OF THE EXECUTIVE BRANCH OF THE GOVERNMENT

In *Myers vs. United States,* 272 U. S. 52, on page 170, the Supreme Court says that "in the use of Congressional legislation to support or change a

particular construction of the Constitution by acquiescence," the attitude of the executive branch should be considered.

That Congress has not an unlimited discretion in taxation and appropriation of public money, but is confined to the national purposes set forth in the Constitution, is suported by the following Executive Papers in the Messages and Papers of the Presidents:

Jefferson: Sixth Annual Message, Dec. 2, 1806, Vol. I., p. 405;

Madison: Veto Message, March 3, 1817, Vol. I., pp. 584-585;

Monroe: First Annual Message, Dec. 2, 1817, Vol. II., pp. 11-18; Veto Message, May 4, 1822, Vol. II., pp. 142-143;

Jackson: Veto Message, May 27, 1830, Vol. II., pp. 483-488; Veto Message, Dec. 6, 1832, Vol. II., pp. 638-639;

Tyler: Veto Message, June 11, 1844, Vol. IV., p. 330;

Polk: Veto Message, Aug. 3, 1846, Vol. IV., pp. 460-462; Veto Message, Dec. 15, 1847, Vol. IV., p. 610;

Pierce: Message, Dec. 30, 1854, setting forth reasons for veto, August 4, 1854, Vol. V., pp. 257-259; Veto Message, May 3, 1854, Vol. V., pp. 247-255; Veto Messages, May 19 and May 22, 1856, Vol. V., pp. 386-387;

Cleveland: Veto Message, February 16, 1887, Vol. VIII., p. 557; Veto Message, March 2, 1889, Vol. VIII., pp. 837-839; Veto Message, May 29, 1896, Vol. IX., pp. 677-679.

## DECISIONS INVOLVING THE GENERAL WELFARE CLAUSE

In *United States vs. Boyer,* 85 Fed. 425, the District court held that the General Welfare Clause does not confer any distinct and substantial power on Congress to enact any legislation.

In *Miles Planting & Mfg. Co. vs. Carlisle,* supra, the Court of Appeals for the District of Columbia held that Congress, under the General Welfare Clause had no power to enact the sugar bounty clause of the McKinley Tariff Bill. This involved the appropriation of Federal funds for a purpose which was beyond the enumerated powers of the Federal Government.

In *Amazon Petroleum Corp. vs. Railroad Commission,* supra, Judge Bryant quotes with approval the language of Chief Justice Hughes with reference to the General Welfare Clause to which we elsewhere refer.

In *Hart Coal Corp. vs. Sparks,* 7 Fed. Supp. 16, Judge Dawson says with reference to the General Welfare Clause:

> "Clause 1, Sec. 8, Art. 1, of the Constitution, which vests Congress with the power to lay and collect taxes, etc., is so punctuated that, if considered by itself, it might be construed as conferring two separate and distinct powers upon Congress—one to lay and collect taxes, and the other to pay the debts and provide for the common defense and general welfare of the United States. Of course, if such construction were given to this section, it would wipe out all

> limitations upon the powers of Congress and leave it with unlimited power to legislate for the general welfare of the United States. The inevitable result compels a rejection of such a construction."

The only cases in which this question has been squarely presented and squarely determined are the case at bar and the case of *Missouri Public Service Co. vs. City of Concordia,* heretofore discussed. There the court undertakes to sustain its position by referring to three authorities in the Supreme Court of the United States:

> *United States vs. Gettysburg R. Co.,* 160 U. S. 668;
> *United States vs. Realty Co.,* 163 U. S. 427;
> *Field vs. Clark,* 143 U. S. 649.

The decision concedes that in the Gettysburg case the most that can be said is that it constitutes strong *dictum* supporting the doctrine that the General Welfare Clause is an independent source of power. The court does not place its decision upholding the condemnation on that ground. In that case, a tract of land was being condemned for the purpose of preserving the lines of battle at Gettysburg, marking with tablets the tactical positions of the different organizations engaged in the battle, for cemeteries for the burial of deceased soldiers, and was related to the power to make war.

In *Field vs. Clark,* the Supreme Court had under consideration the McKinley Act, which among other

things appropriated money to pay a bounty to producers of sugar. The sole power relied on for the appropriation was the General Welfare Clause. The court expressly declined to pass upon the question, basing its decision upon the proposition that even if that clause of the act was unconstitutional, it did not affect the other provisions of the act.

In the later case of *United States vs. Realty Co.,* it appears that in 1894 the bounty provision of the McKinley law was repealed. An appropriation was made by Congress in 1895 for the payment of bounty claims arising under the Act of 1890 to certain manufacturers and producers of sugar who had complied in good faith with the Act of 1890. It was argued by counsel for the government that Congress had no power to recognize those clauses because the provision in regard to the payment of bounties in the Act of 1890 was unconstitutional. (The bounty provision had been held unconstitutional in *Miles Planting & Mfg. Co. vs. Carlisle,* supra.) The question of the General Welfare Clause was presented but the Supreme Court expressly refusd to pass on the question of the constitutionality of the sugar bounty.*

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*The court said:

> "In the view we take of these cases the rights of the parties may be passed upon and the actions finally decided without our entering upon a discussion as to the validity of the bounty legislation contained in the Act of 1890,

Certainly, the court in the *City of California* case misapplies this decision in undertaking to assert that it sustains its view. All that the Supreme Court held was that in a case where citizens had in good faith complied with an act of congress, after consummation of the transaction, a moral obligation might arise which Congress could recognize, but the case furnishes no basis for the claim that the United States would be compelled to recognize such a moral obligation.

The court's conclusion in the *City of California* case seems to be that because a moral obligation might arise between the parties, if a transaction was consummated, even though based upon an unconstitutional statute, that therefore in advance of the consummation, the illegal transaction cannot

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and without deciding that question. For the purpose of the discussion of this case we think it unnecessary to decide whether or not such legislation is beyond the power of Congress. (P. 434.) * * *

"We regard the question of the unconstitutionality of the bounty provisions of the Act of 1890 as entirely immaterial to the discussion here. (P. 437.) * * *

"It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises." (P. 440.)

be enjoined. The statement seems to carry its own refutation.

In the instant case, we are not dealing with a situation where anyone has expended money on the faith of some act of congress, but we are in the position of a property holder threatened with injury by an illegal appropriation of Federal moneys, anticipating that injury, and in advance of the injury preventing it.

There is one case in the Supreme Court, however, which expressly says that Congress has not the power to levy taxes for the purpose of legislating upon subjects not intrusted to Congress or committed to it by the Constitution. In the *Child Labor Tax Case* (*Bailey vs. Drexel Furniture Co.,* 259 U. S. 20, 37), the court said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the

national power, on the other, our country has been able to endure and prosper for nearly a century and a half.''

## ARTICLE IV OF SECTION 3 OF THE CONSTITUTION

The extremity to which counsel is driven in order to defend the expenditures undertaken by appellant Ickes is no better disclosed than where the appellants rely upon Article IV of Section 3 of the Constitution, empowering Congress to dispose of property of the United States as justifying this expenditure. The power of appropriation of money by Congress cannot be separated from the power of taxation. The theory appellants present, namely, that Congress may levy taxes under the General Welfare Clause and then may do as it pleases with the moneys and dispose of them for purposes for which it could not constitutionally tax the people, is an unconscionable doctrine. Under Article IV, Section 3, Congress has the power to dispose of property of the United States, but that provision certainly was not intended to cover the power of Congress to tax and then to dispose of those funds for non-Federal and unconstitutional purposes.

*Story on the Constitution,* Vol. 2, Sec. 1327, distinguishes between the appropriation of other revenues of the government and the proceeds from the sale of public lands. The power of Congress over the public lands, of course, is exclusive and absolute.

But the complete answer to this contention of appellants is found in Article 1, Section 9, Clause 7 of the Constitution:

> "No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

What Congress has no power to do directly, it cannot do indirectly by means of the taxing power or other device.

If such a construction is to be permitted, then Congress can become supreme. The Federal Government is no longer one of enumerated powers. Powers reserved to the people and the states will be subject to destruction by Congress.

This case presents a question of power—not of policy.

## LEGISLATIVE POWER IS UNCONSTITUTIONALLY DELEGATED BY THE PROVISIONS OF SECTIONS 201, 202 AND 203 OF TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT

Since the decision of the Supreme Court in *Panama Refining Co. vs. Ryan,* decided January 7, 1935, it is unnecessary to discuss the law applicable to the question, but simply to apply that decision to the provisions of the statute in question.

The delegation of power is illegal for the following reasons:

The act gives to the President an unlimited authority to determine the policy and to create the Federal Emergency Administration of Public Works, or not to create it, as he sees fit.

The act contains no definition of the circumstances and conditions under which the President shall exercise his discretionary authority to create, or not to create, the Public Works Administration, and requires no finding by the President in the exercise of his discretionary authority so to create, or not to create the same.

Congress has no power to give to the President an unlimited authority to construct, finance or aid in constructing or financing of any Public Works project included in the program prepared pursuant to Section 202, or not to do so as he thinks fit, or to make or not to make grants or loans to states, municipalities or public bodies for the construction, repair or improvement of any such works as he may in his discretion or the discretion of the Public Works Administrator see fit;

The Act of Congress does not require any finding of the President in the exercise of the discretionary authority to construct, finance or aid in the construction or financing of any such works or the making of any finding as to the terms upon which

grants to states or municipalities or other public bodies may be made;

Congress has established no standard to govern the President's action or the action of the said Administrator and no standards are set up to guide the Administrator in accomplishing the indefinite purpose of increasing employment by the preparation of a public works program;

There is no adequate basis of selection of projects or adequate designation of beneficiaries and no specification of the amount of money to be expended on any project or class thereof.

Congress has no power to appropriate moneys to be expended by the President or by any administrative bureau for any project except as specifically mentioned and described in the act. The development and construction of a Diesel engine generating plant and electric distribution system are not included within the provisions of said sections. If any such power is exercised, or attempted under Section 202 on the theory that the same is granted under the authority to prepare a comprehensive plan of such work, "which shall include among other things the following" and the same are not included therein, such grant of power is invalid.

Congress has no power to appropriate moneys to be expended by either the President or the Administrator by gifts or grants for specified purposes

named in the act without allocation thereof by Congress for particular enterprises or classes thereof, and Congress has no power to authorize the President or the Administrator to spend that money for any purpose which they or either of them may think for the good of the country or the welfare thereof.

A mere statement of these grounds would seem sufficient, and the application of the doctrine of *Panama Refining Company vs. Ryan,* makes it essential to hold this act undertakes an unconstitutional delegation of power.

The provisions of Sections 201, 202 and 203 certainly go much further than Section 9 of Title I, which was held unconstitutional in *Panama Refining Company vs. Ryan.* Can it be that Congress can appropriate billions of dollars and delegate to some officer or administrator the power to determine what electric power developments shall be made within the United States with that money and in his unrestricted discretion to determine what power shall be developed and where, under what terms, how it shall be marketed, the rates to be received for it, and as in a case such as the one at bar, to advance moneys of the United States to a municipality to build a small, local generating plant and distribution system within the city and to control the rates to be charged by such municipality? That is exactly what the appellant Ickes has done. To

show the danger of such unconstitutional delegation of power, one need but read paragraph XXII of the bill of complaint.

Concededly Congress would not have power to enact a law undertaking to regulate such matters within the City of Coeur d'Alene. How then can it delegate such a power to the President or the Administrator?

Paragraph XXII incorporates the statement of the policy adopted by Mr. Ickes in making loans and grants such as the one in this case. It is perfectly evident that it is based solely upon an undertaking on his part to regulate the rates of private utilities and the cost of electric power, and to achieve an object which he considers "socially desirable", namely, cheaper electric light and power rates. His release shows that the loans and grants are not made for any purpose of increasing employment, but solely and only for the purpose of coercing private utility owners into fixing rates which Mr. Ickes considers "socially desirable". As Chief Justice Hughes says in *Panama Refining Company vs. Ryan:*

> 'The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute."

In the brief of counsel for the appellant Ickes, in this court (p. 103) counsel thus undertakes to defend the actions of Mr. Ickes:

> "The Act invests the Administrator, at the direction of the President, with the discretion to finance or not to finance projects according to their judgment of comparative social desirability. Accordingly the Administrator has adopted the policy complained of by the appellee of preferring such municipal electric enterprises as will produce economies to cities over purchased power or provide electric rates lower than those provided by existing utilities if at such lower charges or rates the enterprises are self-liquidating. This test of desirability is within the discretion conferred. As the Act authorized the financing of such municipal enterprises and as the funds available were insufficient to finance all enterprises applying for aid, it has been necessary to apply a reasonable test."

In the brief before Judge Canavah, the same counsel for the Administrator, referring to the release set forth in paragraph XXII of the bill of complaint says:

> "The Administrator has discretion under Sections 202 and 203 to include in the comprehensive program or not to include, to finance or not to finance, state projects. This power to select implies the power to determine the basis of selection. Obviously the said selection among the multitudinous projects of public bodies is a function which requires declarations of policy and rules whereby the selection may be made uniform and not arbitrary. The Congress has committed to the Administrator the power

> to determine the relative social desirability of projects. Exercising that power he has determined that municipal electric projects which do not offer rates lower than existing rates are socially undesirable. This is an administrative function which the courts are not empowered to review."

Thus confessedly the statute is unconstitutional under the decision in *Panama Refining Co. vs. Ryan*. According to counsel's own statement, the act contains no definition of the circumstances and conditions under which these loans and grants may be made, or denied. Certainly it cannot be claimed that this exercise of power on the part of the Administrator consists merely in the making of subordinate rules within prescribed limits. Concededly Congress cannot pass an act declaring that the funds shall be parcelled out to cities and municipalities where the existing utility does not agree to reduce its light and power rates and such loan and grant to cities and municipalities denied where the utility does reduce its rates. How then can the Administrator exercise such power?

## THE EXPENDITURE OF PUBLIC MONEYS FOR THE CONSTRUCTION OF THE PLANT IN QUESTION IS NOT AUTHORIZED BY SECTIONS 201, 202 AND 203 OF TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT

Because even if the act is unconstitutional and the powers of the Administrator valid, the defend-

ant Ickes is arbitrarily and unreasonably abusing and exceeding such powers. A discussion of this question involves a policy and conduct of the defendant Ickes violative of the terms of the National Industrial Recovery Act, and also in violation of the Tenth Amendment. Mr. Ickes' policy is one which is not delegated to him by Congress, is clearly for no other purpose than the regulation of light and power rates throughout the United States and part of a policy set up by him beyond anything which can be found within the act and clearly violative of the Tenth Amendment. Judge Cavanah well disposes of the matter in his opinion where he says:

> "It is not seriously urged that under the facts alleged in the bill, an emergency in fact exists or to relieve unemployment or distress in the City of Coeur d'Alene, calling for the making the loan and grant. The bill discloses just the opposite, and one would gather from it that the real purpose of making the loan and grant is to bring about the construction of a utility and to regulate the rates for electricity, for it clearly indicates that the lowering of rates is the primary purpose and object of the national government in offering aid to the city as the Administrator requires of the city to agree to reduce the rates 20 per cent below those now charged by the plaintiff before the loan and grant will be made, and should the plaintiff not reduce its rate to meet the Administrator's approval the loan and grant will be refused. No other reason appears why the loan and grant is being made. Obviously direct control of local utilities operating solely within the state and the regulation of rates is in the

state and beyond the power of the national government."

We may say that even if the powers of the Public Works Administrator under the National Industrial Recovery Act are valid, those powers are being misused for the purpose of regulating the electric rates to be charged in the City of Coeur d'Alene, whether by this plaintiff or by the municipality. In *American Bank & Trust Co. vs. Federal Reserve Bank,* 256 U. S. 350, a petition for an injunction charged that the Reserve Bank purposely accumulated checks upon county banks until they reached a large amount and then presented them over the counter demanding payment in cash for the improper purpose of coercing and intimidating the banks into becoming members of the Federal Reserve System, or at least arranging for clearance of checks at par in accordance with the scheme authorized by the Federal Reserve Act. It was held that the petition stated a cause of action. Therefore, upon the same principle, the acts and policies of the Public Works Adminsitrator are unlawful even if the National Industrial Recovery Act be held constitutional and such acts and policies be held to fall within the terms of that Act.

The complaint alleges (R., p. 68) the Federal Administrator of Public Works in making the loan and grant to Coeur d'Alene for the purposes mentioned in the complaint is undertaking an arbitrary, unreasonable and capricious exercise of delegated authority,

(if indeed it is delegated), in the construction of a small Diesel engine electric generating plant and distribution system in Coeur d'Alene; that the disbursement of public funds of the United States for that purpose does not and will not accomplish or tend to accomplish any of the purposes or objects proposed in the National Industrial Recovery Act; "It does not tend 'to eliminate unfair competitive practices,' but to increase such unfair competitive practices nor 'to promote the fullest possible utilization of the present production capacity of industry,' but rather to discard and render useless much of the productive capacity of plaintiff and similar industries."

It is not seriously urged that it increases or tends to increase employment in Coeur d'Alene, but on the contrary its effect will be actually to reduce employment.

And as has been shown in the complaint and the affidavit of Richard McKay in support of the application for a temporary injunction, the project is so unsound that repayment of the loan is not reasonably secured.

### THE TENTH AMENDMENT

The Supreme Court in *Kansas vs. Colorado,* 206 U. S. 46, speaking of the Tenth Amendment says:

> "*This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act.* It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit: 'the people.' Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted." (Italics ours.)

The Federal Government has no power to invade the exclusive powers and functions of the State of Idaho to regulate utilities in the state engaged in intrastate business or to fix and regulate rates and service thereof.

If the National Industrial Recovery Act undertakes any such exercised power, it violates the Tenth Amendment and is unconstitutional, and beyond any power granted the Federal Government under the Constitution.

The acts of the Public Works Administrator are in violation of the terms and provisions of the

National Industrial Recovery Act and a usurpation of power not even granted thereunder.

*Tenth Amendment to the Federal Constitution;*

*Child Labor Tax Case,* 259 U. S. 20;

*Hammer vs. Dagenhart,* 247 U. S. 251;

*Hart Coal Corporation vs. Sparks,* 7 Fed. Supp. 16;

*Kansas vs. Colorado,* 206 U. S. 46.

The State of Idaho has exclusive jurisdiction to regulate such rates and services. As to privately-owned utilities, it has exercised that power; as to publicly-owned utilities, it has not exercised the power, but it is reserved in the state.

Congress has no police power as that term is generally understood within the jurisdiction of sovereign states, except over property owned therein by the government in its proprietory capacity.

*Hammer vs. Dagenhart,* 247 U. S. 251;

*Cooley's Constitutional Limitations* (8th Ed.) Vol. 1, p. 11;

*United States vs. DeWitt,* 9 Wall. 41;

*Tenth Amendment to the Federal Constitution;*

*Keller vs. United States,* 213 U. S. 138;

*Hart Coal Corporation vs. Sparks,* 7 Fed. Supp. 16.

The declaration of Mr. Ickes and the telegrams passing between Mr. Ickes and Mr. Post and the telegram and letter forwarded by Mr. Ickes to the City of Coeur d'Alene (set forth in paragraph XXII of the complaint), and the terms of the contract which the appellant municipality and its officers undertook to execute, show that Mr. Ickes in violation of the Constitution, is unlawfully seeking to transcend the powers of a Federal officer and extend his power over matters which are not committed to the Federal Government or its officials.

## TITLE II, SECTIONS 201, 202 AND 203 OF THE NATIONAL INDUSTRIAL RECOVERY ACT DOES NOT AUTHORIZE THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO MAKE THE LOAN AND GRANT TO THE CITY OF COEUR D'ALENE

Such a project as that proposed by the City of Coeur d'Alene is not within the enumerated works covered or pretended to be covered by the Act. The Act does provide that there shall be included:

> The development of water power.
> The transmission of electric energy.

In the Senate an amendment was adopted, adding "the generation and distribution of electricity." (Senate Amendment No. 44.) That amendment was rejected in conference. 77 Congressional Record,

page 5620. Certainly transmission of electric energy and distribution of electric energy are two separate and distinct things. It is a matter of common engineering knowledge that transmission does not include distribution. Transmission means the carrying of electricity from the place where it is generated to the place where it is to be distributed.

Appellants assert that the construction of a small Diesel engine generating plant and distribution system comes within the term "publicly-owned instrumentalities and facilities." If the argument that such general provision applies, why was it necessary to insert the special words "transmission of electricity"? Apparently it was regarded as essential to include "transmission" and Congress deliberately omitted "distribution". The precise question of including such local generating and distribution systems was proposed, incorporated and finally eliminated from the act.

Without question, the debates in Congress are not appropriate sources of information from which to determine the meaning of a statute passed by that body.

The Supreme Court, however, refers to the fact that it is interesting to note that certain efforts to amend a bill were made and rejected.

*Dunlap vs. United States,* 173 U. S. 65, 75.

## THE COMMERCE CLAUSE

The construction of the proposed electric plant in Coeur d'Alene is purely an intrastate matter.

(2) *Utah Power & Light Co. vs. Pfost,* 54 Fed. 803, affirmed in the 286 U. S. 165.

The National Industrial Recovery Act construed as affecting intrastate commerce is unconstitutional.

*Tenth Amendment to United States Constitution;*
*Kansas vs. Colorado,* 206 U. S. 46, 90, 91;
*Hammer vs. Dagenhart,* 247 U. S. 251;
*Missouri Public Service Co. vs. City of Concordia,* supra;
*Oliver Iron M. Co. vs. Lord,* 262 U. S. 172;
*Bailey vs. Drexel Furniture Co.,* 259 U. S. 20.

It is not seriously urged that the power to make the appropriation and the loan and grant involved in this case can be justified under the Commerce Clause.

## NON-FEDERAL GROUNDS

*Idaho Constitution Violated*

In the opinion of Judge Cavanah the plan for financing the proposed enterprise violates Section 3 of Article VIII of the State Constitution. This is based upon the facts alleged in the complaint that the ordinance as submitted provided only for incurring a liability or indebtedness in the sum of $300,000.00, whereas the plan proposed provides for a plant costing in excess thereof. Judge Cavanah discussing the Idaho Constitution says:

"The scope of the words 'indebtedness or liability,' as employed in the State Constitution, is meant to cover all character of debts and obligations which the city may become bound. The Supreme Court of the state has left no doubt as to its construction of this provision for it has said: 'The Constitution not only prohibits incurring of any indebtedness, but it also prohibits incurring of any liability 'in any manner or for any purpose,' exceeding the yearly income and revenue.' In this connection, it should also be observed that it not merely prohibits incurring any indebtedness or liability exceeding the revenue of the current year, but it also prohibits incurring any indebtedness or liability exceeding the income and revenue provided for such year." (Citing *Feil vs. City of Coeur d'Alene,* 23 Idaho, 32-49 and *Miller vs. City of Buhl,* 38 Ida. 668.)

The Supreme Court in *Feil vs. City of Coeur d'-Alene* and again in *Straughan vs. City of Coeur d'-Alene,* 53 Ida. 494 has held that the term *liability* as used in Section 3 of Article VIII of the Idaho Constitution, is broader than constitutional prohibitions against excessive indebtedness, is more comprehensive and sweeping and means and signifies the state of *being bound or obligated in law or justice to do, pay or make something good;* to cover all kinds and character of debts and obligations for which a city may become bound.

It is sought to avoid the effect of the constitutional limitation upon the municipality by asserting that a portion of the funds to be received by the city represents a gift from the Federal Govern-

ment. If that be true, then the acceptance of any sum in excess of $300,000 constitutes the creation of an illegal, unauthorized liability or indebtedness under the provisions of the Idaho Constitution, and for several reasons.

If the officials of the United States shall give or grant to the City of Coeur d'Alene moneys of the United States and no authority of law exists for such payments, the United States may recover such money.

*Bayne vs. United States,* 93 U. S. 642;

*United States vs. Burchard,* 125 U. S. 176;

*Wisconsin Central R. vs. United States,* 164 U. S. 190.

It is urged by counsel for the appellant Ickes that the United States will be estopped from recovering public funds unconstitutionally and wrongfully diverted to the municipality. He cites but one authority, the decision in *Missouri Utility Co. vs. City of California.* That opinion is not supported either in principal or authority and it is contrary to the decisions which we have above cited. The argument attempts to distinguish the cases which we have cited by saying that the payments involved were made without any statutory authority or under some misconstruction of a statute. That is exactly what we claim is the case here.

At the present term of the Supreme Court in *Wilber National Bank vs. United States,* decided February 4, 1935, the court held that the United States is not bound or estopped by the acts of its officers and agents in entering into an agreement or arrangement to do or cause to be done what the law does not sanction or permit, and that persons dealing with an agent of the United States are charged with notice of the limitation of his authority.

Counsel for the Administrator in the lower court contended that the so-called grant of 30% is not a gift at all but a grant to the city in consideration of the performance of onerous covenants by the city. Among the onerous conditions which the City of Coeur d'Alene is required to agree to in the contract which it has signed in this case are that the city shall adopt a rate and bond ordinance satisfactory to the Administrator in form, sufficiency and substance. It is provided that among other things the ordinance shall provide that no donations, taxes, depreciation charges or any other items of expense, (except normal operating expenses and maintenance, together with extensions), shall be charged against the revenues of the project. The letter of the Public Works Administrator incorporated in the complaint (R., pp. 55-56) shows that the rate ordinance which will meet with the approval of the Administrator must fix rates approximately 20% below existing rates and that the

ordinance shall provide that the rates will be made available and not increased until proved to the satisfaction of the Administrator that the rates are insufficient to provide for operating expenses, improvements, extensions and so much of the debt service as is represented by the proportion which the cost of the electric system bears to the cost of the entire project. It also requires that the ordinance should provide with reference to the rates for street lighting and other municipal service and that it should recite that the agreement of the city to maintain such rates and charges as aforesaid is in further consideration of the grant from the government and is for the benefit of electric consumers and taxpayers of the city. "It will be necessary that the ordinance be approved by the Administrator."

Is not the city under such agreement contracting a liability, or as stated in *Fiel vs. City of Coeur d'Alene,* a "state of being bound or obligated in law or justice to do, pay or make something good." The grant is made in consideration of the agreement. Suppose the city violates the agreement? Will it not be subject to suit by the government for the recovery of the money so advanced as a consideration therefor? Or is it not subject to an action by the government to specifically enforce the contract, to make it *do* something? Does the Federal Government contend that the city may disavow these agreements contained in the contract with impunity?

Counsel for the city go a step further than counsel for Mr. Ickes. They proceed upon the theory "let the lender beware." It is asserted by counsel that an obligation incurred in violation of Section 3 of Article VIII of the Constitution of Idaho is void and unenforceable. Therefore, conceding that the indebtedness is illegal, the city, once it gets the money, is under no obligation to repay the same. In other words, "it is not a debt." This rather unconscionable position amounts in effect to saying that the court should not interfere because after the transaction is consummated, the city may with impunity repudiate it. Under that peculiar doctrine, the Supreme Court of Idaho erroneously decided the cases in which it has enjoined the violation of Section 3 of Article VIII of the Constitution and restrained municipalities from violating the terms thereof. Under the theory presented by counsel for the city, the Supreme Court should have simply held that the borrower should beware, and if he loaned the money, the city would not be injured, but it could repudiate the liability or obligation.

But the Supreme Court of Idaho said that the term "liability" within the constitutional prohibition means the state of being bound or obligated in *law or justice to do, pay or make something good.*

Another reason why the proposed transaction violates this constitutional provision is involved in the purported surrender to the Public Works Ad-

ministrator of the right to determine what rates the city shall charge for electricity, as well as the provisions required in the rate ordinance with reference to the use of funds received from light and power sales.

As we have pointed out elsewhere this attempted exercise of power by the Public Works Administrator violates the Tenth Amendment. The whole performance is illegal in that the officials of the city by accepting the conditions of the contract undertook the unwarranted and unlawful surrender of police power now vested in the city itself but primarily vested in the State of Idaho.

*McQuillan on Municipal Corporations,* 2nd Ed., Vol. 3, p. 57 and cases there cited.

The Supreme Court of the United States has announced the rule as follows:

> "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."
>
> *Northern Pacific Ry. Co. vs. Minn. ex rel Duluth,* 208 U. S. 583;
>
> *Boston Beer Co. vs. Mass.,* 97 U. S. 25.

In Idaho, the power at this time to regulate rates of municipal utilities is committed to the municipal government. However, the power to regulate these rates is in the legislature, and it may commit that power to the Public Utilities Commission if it desires.

Assuming that the contract is legal and valid and the grant and loan is made and the city, in violation of the agreement, declines to pass a rate ordinance which is satisfactory to the Administrator, or thereafter without his consent, changes the rates, could not the United States recover the money so paid for breach of the contract by the city?

But in addition to this, the contract undertakes to provide what the rate ordinance shall contain and among other things provides that no depreciation charges shall be charged against the revenues of the project. Section 49-1132, Idaho Code, Ann. 1932, provides:

> "In fixing said charges, rates or revenues, said municipal corporation shall have the right to take into consideration and include, in addition to all of its other expenses and costs incurred in the operation of said plants, any or all of the following items; any interest on any bonded or other indebtedness created in order to acquire, construct, enlarge, extend, repair, alter and improve such plants, or any of them; a sinking fund to meet said indebtedness; and a fund to meet and provide for any depreciation on said plants, and to provide for extensions or equipment necessary to meet the needs of the community served."

Among the items so included is depreciation. Under the contract which has been signed by the city and pursuant to the ordinance passed on the 23rd of November, 1934, the city officials agree that depreciation shall not be charged. Are they not there undertaking a liability in consideration of

the grant from the United States which in justice their successors should live up to, but which they are not bound to because the controlling statute gives them the power to make such depreciation charges?

*The Effect of Omitting Part of the City*

The report of the engineer employed by the city prior to the bond election to outline a plan for the construction of a municipal distribution system purported to show the cost of a complete generating plant and distribution system for the city (Complaint, par. XIII). The ordinance (Ex. A., R., pp. 77 to 83) in its title shows that it provides for the incurring of an indebtedness for paying the costs and expenses of the acquisition by purchase or by construction thereof of a light and power plant for said city, and Section No. 1 of the ordinance contains the same statement. There is nothing in the ordinance indicating that anything is planned other than a complete distribution system.

The campaign conducted by the defendant city and its officers led the people to believe that the matter submitted to a vote was whether or not a system should be acquired or constructed for the service of the entire city. The Chairman of the Fire, Light and Water Committee of the city published a letter (R., pp. 149 to 155) in which he stated that it was the intention of the city to build a much larger and better designed electric distribution system (compared to the existing system) and that the

city intended "to connect up all porch lights on the city side of the meter so that each resident can have a porch light all night." The fact is that two sections of the city were not included within the distribution system planned and the report of the engineer failed to provide service therefor. In the districts omitted, the appellee is now serving 155 customers (Comp., p. 32) and in other disconnected areas in the city, for which service is not provided, an additional 25 customers are served.

These facts were concealed from the voters and the conduct of the city is defended by it and its officers on the ground that the validity of an election cannot be assailed because of false, misleading or erroneous statements put out by the defendants. No argument is presented or authority cited supporting the assertion that a municipality and its officers can submit such an issue to the voters and conceal a material fact such as in this case, and then the same municipality and the same officers contend that their action cannot be assailed because of such concealment.

The grant of authority to a municipality to acquire by purchase or otherwise a light and power plant by the issuance of bonds requires that the

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*49-2405. *Light and Power Plants.* Every municipal corporation incorporated under the laws of the territory of Idaho or the State of Idaho, shall have power and authority to issue municipal coupon bonds, in a sufficient amount to acquire, by purchase or otherwise, a light

ordinance shall specify and state the amount and *purpose* of such proposed bond issue. Sections 49-2405 and 49-2411, Idaho Code, Ann.*

The ordinance in this case certainly does not contemplate or authorize an indebtedness for anything less than a power plant and distribution system for the serving of the entire city and does not contemplate or authorize the indebtedness for the construction of a plant for a part of the city only.

*Combining the Proceeds of Municipal Bonds Authorized for Two Separate Enterprises into One Project, is Unlawful*

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and power plant for such municipal corporation, and to construct, enlarge, extend, repair, alter and improve such plant.

"The amount for which bonds may be issued for acquiring light and power plants or either, for the purpose of construction, enlargement, extension, repairing, alteration and improvement of an existing plant or for any, or either of said purposes as herein provided, shall be determined by the council or board of trustees and stated in the ordinance therefor. The issuance of bonds for the purpose aforesaid or any of such purposes, shall be authorized as provided in Section 49-2411, and one or more bond elections may be called in the manner as provided in said statute or amendatory act, in order to submit to the qualified electors who are taxpayers, the question as to whether bonds shall issue in such amount as the city council or board of trustees, at the time any such election is called, shall deem to be necessary for the purposes aforesaid or any or either of them."

The loan and grant agreement between the city and the Public Works Administrator (Ex. D) and the ordinance approving the same (Ex. C) discloses that defendants propose that the government shall finance one project consisting of a water system and a Diesel engine generating plant and electric distribution system. The two municipal projects are handled as one. The contract does not separate the amount which is to be charged to the one, the amount charged to the other, or the amount of the grant or gift which is to be credited to the one or the other. The bonds are not separately sold

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"49-2411. *City and Village Bonds—Ordinance—Election.* Whenever the common council or the trustees of a municipal corporation, or other legislative body of any municipal corporation, shall deem it advisable to issue the coupon bonds of such municipal corporation for any of the purposes aforesaid, the mayor and common council or the trustees of such municipal corporation shall provide therefor by ordinance, which shall specify and state and set forth all the purposes, objects, matters and things required by Section 3 of the 'Municipal Bond Law' of the State of Idaho (Sec. 55-203, Idaho Code) and make provision for the collection of an annual tax sufficient to pay the interest on such proposed bonds as it falls due and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same as required by the constitution and law of Idaho.

"The ordinance shall provide for the holding of an election of the qualified electors who are taxpayers of such municipal corporation,

and the entire project is treated as a single unit. No provision is made as to the bonds under each issue which are to mature during the several years. No distinction is made between the bonds issued for the water system and the bonds for the light and power plant. The bond ordinance and the election authorized an expenditure or indebtedness of $300,000 for a generating and light distribution system, and the other ordinance $300,000 for a water system. No authority is found for the issuance of bonds of $504,000, nor is there any authority for

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of which thirty days' notice, to be provided for in such ordinance, shall be given in a newspaper printed and published in such municipal corporation, but if no newspaper be printed and published in the municipal corporation, then in some newspaper having general circulation therein; such newspaper to be designated in said ordinance. Such election shall be conducted as other municipal elections. The voting at such elections must be by ballot, and the ballot used shall be substantially as follows: 'In favor of issuing bonds to the amount of_____dollars for the purpose stated in ordinance No. _____,' and 'Against issuing bonds to the amount of_____dollars for the purpose stated in ordinance No. _____.' If at such election held as provided for in this chapter, two-thirds of the qualified electors who are taxpayers in such municipal corporation, voting at such election, assent to the issuing of such bonds and the incurring of the indebtedness thereby created for the purpose aforesaid, such bonds for said purpose shall be issued in the manner provided by said 'Municipal Bond Law' of the State of Idaho."

combining the same. No provisions are found for the keeping of separate accounts in the two enterprises or for limiting the expenditure in each within the expenditure authorized by the voters. The attempted arrangement is in violation of Sections 55-203, 55-204 and 55-212 of the Idaho Codes Ann. Those provisions of the Idaho Code are as follows:

"Section 55-203. *Authorization of Bonds.*—

Whenever the governing board of any such corporation shall deem it advisable to issue the negotiable coupon bonds thereof for any authorized purpose, such governing board shall provide therefor by ordinance or resolution, duly passed and adopted and spread at length on the permanent record of its proceedings, which ordinance or resolution shall specify and state the amount and purpose of such proposed bond issue, the ultimate maturity of such bond issue, and that the annual bond maturities thereof shall be amortized and payable in accordance with the provisions of this act."

"Section 55-204. *Bonds—Form and Recitals.*—

Each bond shall be numbered consecutively and shall be payable and paid to bearer, in numerical order, lowest numbers first, and shall state and recite upon the face thereof the purpose for which the same is issued, the principal amount thereof, rate of interest thereon, date of issue, time and place or places of payment, and that it is issued in conformity with and after full compliance with the constitution of Idaho and this act and all other laws applicable thereto, and that the full faith, credit and all taxable property within the issuing corporation are and shall continue pledged for and until the full payment of the principal and interest thereof; and there may be set forth

upon the face of said bonds such other statements and recitals as are customary and not prohibited by law."

"Section 55-212. *Bonds for Each Purpose a Distinct Series.*—

All bonds authorized by the vote of the electors upon a distinct proposition submitted unto them or authorized by any governing board where no popular election is required by law and for one purpose, shall constitute a distinct series, the bonds of which may be issued by any such governing board in separate issues, if deemed by such governing board to be to the best interest of the issuer so to do. The bonds of each series and of each of the issues thereunder shall be distinguished upon the face of each of such bonds by some distinguishing numbers or letters or descriptive language as may be determined by any such governing board; and the bonds of each such issue shall be numbered from one upwards consecutively."

From these sections, it will be seen that the city has no power to contract jointly with reference to these separate issues. The law requires that neither project shall result in an indebtedness or liability in excess of the amount authorized; that in case a less amount shall be sufficient for either of said projects, the bond indebtedness of that issue shall be reduced to the extent thereof. Under the plan proposed, it would be tempting, easy and undoubtedly would result in the use of funds from one authorized issue to construct the plant of the other. This contract and ordinance violates not only the letter, but the spirit of the statute.

THE ORDER GRANTING THE INJUNCTION MUST BE AFFIRMED UNDER THE TERMS OF THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935

The Emergency Relief Appropriation Act of 1935 approved April 8, 1935, Public Resolution—No. 11—74th Congress, provides among other things:

> "* * * this appropriation shall be available for the following classes of projects, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: * * *
>
> (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisons and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000."

The purpose of the amendment was to limit projects for which loans and grants can be made to those where not less than 25% of the loan or grant, or the aggregate thereof, is to be expended for work upon such particular project.

In this case, the bill shows that only $29,000 is to be expended for labor in the construction and installation of the Diesel engine power plant and

electric distribution system plus a share of the expenditure of $6,900 for labor for a building to house the engine and also to house the pumps for a water system.

In *Ely vs. Northern Pacific Railway Co.,* 197 U. S. 1, the Supreme Court held that an act of Congress passed even after the decision in a particular case in the lower court and which affects the merits of that case, will be controlling upon the Supreme Court and may be called to its attention by brief.

### GRANTING OF TEMPORARY INJUNCTION A MATTER OF DISCRETION

The question of granting a temporary injunction pending the decision in this case was one which rested in the sound discretion of the trial court and its decision should not be reviewed unless it appears that that legal discretion was improvidently exercised.

*Idaho-State Mining & Dev. Co. vs. Bunker Hill & Sullivan M. & C. Co.,* 121 Fed. 973.

Respectfully submitted,

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